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No. 99——

IN THE
Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA,
AND GREEN TREE FINANCIAL CORPORATION,
Petitioners,

v.

LARKETTA RANDOLPH,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that an order compelling arbitration and dismissing a lawsuit's underlying claims is a "final decision with respect to an arbitration" appealable under 9 U.S.C. § 16(a)(3).

2. Whether the court of appeals erred in concluding that an arbitration provision that was "silent" on the issue of costs and fees was unenforceable under the Federal Arbitration Act because the risk that plaintiff "might" be required to bear unknown costs and fees potentially undermined her ability to vindicate statutory rights.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state that they are wholly owned subsidiaries of Conseco, Inc., an Indiana corporation whose stock is publicly traded. Petitioners further state that no publicly owned company owns ten percent or more of the stock of Conseco, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Green Tree Financial Corp.—Alabama and Green Tree Financial Corporation respectfully request that this Court grant their petition for certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 178 F.3d 1149 (11th Cir. 1999) and appears in the Appendix to this Petition ("Pet. App.") at 1a-19a. The court of appeals' unpublished order denying the petition for rehearing *en banc* appears at Pet. App. 55a-56a. The district court's memorandum opinion and order is published at 991 F. Supp. 1410 (M.D. Ala. 1997) and appears at Pet. App. 20a-50a. The district court's order denying respondent's motion for reconsideration is published at 991 F. Supp. at 1425-26 and appears at Pet. App. 51a-54a.

JURISDICTION

The court of appeals entered judgment on June 22, 1999, and denied a timely petition for rehearing on October 28, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, provides appellate jurisdiction for appeals from various categories of district court orders relating to arbitration. *Id.* § 16. Included among the category of appealable orders is "a final decision with respect to an arbitration." *Id.* § 16(a)(3).[1] Section 16 also provides that

[1] Section 16 originally was codified at 9 U.S.C. § 15, and was renumbered without change by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 325(a)(1), 104 Stat. 5089, 5120.

"an appeal may not be taken from an interlocutory order . . . directing arbitration to proceed . . . ." *Id.* § 16(b)(2). Finally, Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* § 2.

STATEMENT OF THE CASE

Statutory Background

This case presents the issue of the proper construction of Section 16 of the 1988 Amendments to the FAA, 9 U.S.C. § 16. Prior to 1988, an arbitration decision that did not qualify for either injunctive appeal under 28 U.S.C. § 1292(a) or discretionary appeal under § 1292(b) was appealable only if it qualified as a "final decision" under 28 U.S.C. § 1291. To determine whether an order constituted a "final decision" under 28 U.S.C. § 1291, courts of appeals drew a distinction "between cases in which arbitration [wa]s the only claim for relief [*i.e.*, "independent" proceedings] and cases in which arbitration [wa]s raised in the midst of a proceeding for other relief [*i.e.*, "embedded" proceedings]." *Perera* v. *Siegel Trading Co.*, 951 F.2d 780, 784 (7th Cir. 1992). Arbitration orders in "independent" proceedings were classified as "final decisions" appealable under 28 U.S.C. § 1291; arbitration orders in "embedded" proceedings were classified as interlocutory and could not be appealed under 28 U.S.C. § 1291. See, *e.g.*, *id.* at 784.

Against this background, Congress enacted Section 16 "to prevent the appellate aspect of the litigation process from impeding the expeditious disposition of an arbitration" (David R. Siegel, *Practice Commentary* to 9 U.S.C.A. § 16, at 495 (West 1999)) and to "promote appeals from orders barring abitration and limit appeals from orders directing arbitration," *Filanto, S.p.A.* v. *Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993).

That congressional purpose is reflected in the fact that Section 16 grants jurisdiction over anti-arbitration orders and denies appellate jurisdiction over orders favoring arbitration. Thus, Section 16 allows immediate appeals from orders "refusing a stay of any action [pending arbitration]," 9 U.S.C. § 16(a)(1)(A), denying a petition "to order arbitration to proceed," *id.* § 16(a)(1)(B), denying an application "to compel arbitration," *id.* § 16(a)(1)(C), "denying confirmation of an [arbitration] award or partial award," *id.* § 16(a)(1)(D), and "modifying, correcting, or vacating an award," *id.* § 16 (a)(1)(E). Similarly, Section 16 authorizes immediate appeal from "an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to [the FAA]," *id.* § 16(a)(2).

On the other hand, Section 16(b), which largely mirrors Section 16(a)(1), severely *limits* "interlocutory" appeals from pro-arbitration orders. *Id.* § 16(b). Thus, absent compliance with the discretionary requirements of 28 U.S.C. § 1292(b), a party is prohibited from appealing an interlocutory order "granting a stay of any action [pending arbitration]," *id.* § 16(b)(1), "directing arbitration to proceed," *id.* § 16(b)(2), "compelling arbitration," *id.* § 16(b)(3), or "refusing to enjoin an arbitration that is subject to [Title 9]," *id.* § 16(b)(4). Because these orders favor arbitration, Congress dictated that appellate review of them must await a "final decision" by the district court terminating the controversy following the completion of the arbitration. *Id.* § 16(a)(3).

Factual Background

On January 25, 1994, respondent Larketta Randolph ("Respondent") purchased a mobile home from Better Cents Home Builders Inc. ("Better Cents"). Pet. App. 2a. Respondent financed the purchase through Petitioner Green Tree Financial Corp.—Alabama, a wholly owned

subsidiary of Green Tree Financial Corporation (collectively, "Petitioners"). *Id.* The financing documents for the purchase required that respondent acquire " 'vendor's single interest' " insurance, which protects a vendor or lienholder against the costs associated with repossession of the property in the event of a loan default. *Id.* Respondent's retail installment contract with Better Cents identified petitioner Green Tree Financial Corp.—Alabama as the assignee and contains the arbitration provision at the center of this dispute. *Id.* at 2a-3a.

The arbitration provision provides that " '[a]ll disputes, claims, or controversies arising from or relating to this Contract or the relationships that result from this Contract, or the validity of this arbitration clause or the entire Contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with the consent of Buyer(s).' " Pet. App. 3a. Moreover, by entering into the contract, the parties acknowledged that " '[t]his arbitration Contract is made pursuant to a transaction in interstate commerce" that is "governed by the Federal Arbitration Act at 9 U.S.C. Section 1.' " *Id.* In addition, the arbitration provision provides:

> The parties agree and understand that all disputes arising under case law, *statutory law*, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this Contract. The parties agree and understand that *the arbitrator shall have all powers provided by the law* and the Contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief.

Id. at 57a (emphases added). The arbitration provision is reproduced in its entirety at Pet. App. 57a-58a.

In January 1996, respondent filed an action in the United States District Court for the Middle District of

Alabama, alleging that petitioners violated the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"), by failing to include the requirement that respondent purchase vendor's single interest insurance in the TILA disclosure, and violated the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f ("ECOA"), by requiring arbitration of all statutory claims. Pet. App. 21a-22a. Respondent requested certification of a class action of all individuals that had entered into similar agreements with petitioners and sought monetary damages, including attorneys' fees and recovery of litigation expenses. *Id.* at 22a, 27a. In lieu of an answer, petitioners responded by filing a Motion to Stay Action and Compel Arbitration. *Id.*

In resolving that Motion to Stay, the district court did not address the merits of respondent's underlying claims but instead focused on whether respondent could be compelled to arbitrate those claims. Pet. App. 26a n.5. Because the contract satisfied the necessary interstate commerce nexus, the court ruled that the FAA applied. *Id.* at 23a n.4 (citing *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995)). The district court noted that by enacting the FAA, Congress "manifested a 'liberal federal policy favoring arbitration agreements,'" and sought "'to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts'" by "plac[ing] arbitration agreements upon the same footing as other contracts." *Id.* at 24a (quoting *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) and *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Further, the district court acknowledged that "'questions of arbitrability must be addressed with a healthy regard for the federal policy *favoring* arbitration.'" *Id.* (emphasis added) (quoting *Moses H. Cone*, 460 U.S. at 24).

To resolve whether respondent could be compelled to arbitrate her statutory claims, the district court applied a settled two-part test that required determination of "[1] whether the Parties' agreement to arbitrate reaches the statutory issues, and . . . [2] whether legal constraints external to the Parties' agreement foreclosed the arbitration of those claims." Pet. App. 27a. *First*, the district court concluded that the arbitration provision encompassed respondent's statutory claims under TILA and the ECOA. *Id.* at 28a. Noting that, by its terms, the arbitration provision applied to " '[a]ll disputes, claims or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of th[e] arbitration clauses or the entire contract,' " and " 'that all disputes arising under case law, *statutory law*, and all other laws, including, but not limited to, all contract, tort and property disputes will be subject to binding arbitration in accord with this Contract,' " the district court concluded that this language was "sufficiently broad to encompass [respondent's] TILA, [ECOA], and other claims." *Id.* (emphasis added).

Second, the district court explained that by agreeing to arbitrate a statutory claim " 'a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.' " Pet. App. 29a (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Accordingly, the district court concluded that *respondent* bore the burden of showing that Congress intended to preclude a waiver of judicial remedies based on "either the text of the statute(s), their legislative histories, or from an inherent conflict between arbitration and the statutes' underlying purposes." *Id.* at 30a.

Because respondent did "not cite any provision of the text or legislative history of either the TILA or the [ECOA] that expressly preclude[d] waiver of judicial remedies," the district court considered whether there was evidence of a "conflict between arbitration and the statutes' underlying purpose." Pet. App. 30a. The district court explained that " 'the fact that [TILA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.' " *Id.* at 33a (quoting *Gilmer*, 500 U.S. at 32). Because respondent did not "cite any compelling evidence in support of her position," the district court concluded that she "failed to meet her burden of showing why the arbitration provision in her contract should not be enforced." *Id.* at 38a. Similarly, the district court rejected as "unpersuasive" respondent's argument that 15 U.S.C. § 1691(a)(3), which bars a creditor from extending credit conditioned on the release of potential claims for TILA violations that arose in the past, rendered the arbitration provision unenforceable. *Id.* at 34a-35a.[2]

Accordingly, the district court granted petitioners' motion to compel respondent to submit her claims "to binding arbitration pursuant to the arbitration provision in her contract." Pet. App. 49a. Acknowledging that it was authorized to stay the proceedings and compel arbitration, see 9 U.S.C. § 3, the district court instead concluded that dismissal was appropriate because all of respondent's claims were to be submitted to arbitration in accordance with the arbitration provision. Pet. App. 48a.

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[2] The district court also rejected respondent's arguments that (1) the arbitration provision was not "[e]nforceable for lack of mutuality of obligation," Pet. App. 40a, 42a, and (2) respondent did not "knowingly enter into an agreement to arbitrate," *id.* at 46a. Finally, the district court ruled that it was bound by circuit precedent to reject respondent's request to "certify a class" for arbitration. *Id.* at 48a.

On reconsideration, the district court adhered to its prior ruling, explaining that it would "gladly modify and/or vacate its [prior] Order," if circumstances warranted. Pet. App. 54a.

Decision of the Court of Appeals

The Eleventh Circuit reversed. Pet. App. 2a. *First*, the court of appeals addressed whether the district court's order was a " 'final decision with respect to an arbitration that is subject to [the FAA].' " *Id.* at 7a (quoting 9 U.S.C. § 16(a)(3)). On that issue, the court of appeals acknowledged that "a number of circuits" had drawn a distinction between " 'embedded' " proceedings in "which the arbitration issue arises as part of a broader action dealing with other issues," and " 'independent' " proceedings, in which "the motion to compel arbitration is the only issue before the court." *Id.* at 7a, 8a (emphasis in original omitted). The Eleventh Circuit recognized that these "circuits have held that orders compelling arbitration which arise in embedded proceedings must be treated as interlocutory and non-appealable, not as 'final decisions' under § 16(a)(3)." *Id.* at 7a.[3] Moreover, it explained that at least five courts of appeals that had adopted the embedded/independent framework for analyz-

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[3] Specifically, the court of appeals identified *eight* circuits in which orders compelling arbitration in "embedded" proceedings would be considered non-final for purposes of Section 16(a)(3). Pet. App. 7a-8a (citing *John Hancock Mut. Life Ins. Co.* v. *Olick*, 151 F.3d 132, 135-36 (3d Cir. 1998); *Seacoast Motors of Salisbury, Inc.* v. *Chrysler Corp.*, 143 F.3d 626, 628 (1st Cir.), *cert. denied*, 119 S. Ct. 410 (1998); *Napleton* v. *General Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir.), *cert. denied*, 119 S. Ct. 341 (1998); *McCarthy* v. *Providential Corp.*, 122 F.3d 1242, 1243 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 275 (1998); *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 136 (4th Cir. 1997); *Altman Nursing, Inc.* v. *Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996); *Gammaro* v. *Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994); *Filanto, S.p.A.* v. *Chilewich Int'l Corp.*, 984 F.2d 58, 60-61 (2d Cir. 1993)).

ing finality under Section 16(a)(3) had held that "a district court's order compelling arbitration in an embedded proceeding is interlocutory and non-appealable, even if the district court dismisses the remaining claims." *Id.* at 8a (emphasis in original omitted) (citing cases).

On the other hand, the Eleventh Circuit recognized that "the Sixth and Tenth Circuits" had adopted a different "approach to the question of whether an arbitration order is an appealable 'final decision' under § 16(a)(3)." Pet. App. 9a. In contrast to the majority rule, these two circuits treated orders dismissing cases in favor of arbitration as "final decisions" appealable under Section 16(a)(3). *Id.* (citing *Armijo* v. *Prudential Ins. Co.*, 72 F.3d 793, 797 (10th Cir. 1995) and *Arnold* v. *Arnold Corp.*, 920 F.2d 1269, 1276 (6th Cir. 1990)).[4]

Having identified "a circuit split on the question whether a district court's order compelling arbitration in an embedded proceeding is an appealable 'final decision' when it dismisses the remaining claims," the court of appeals explained that this was an issue "of first impression" in the Eleventh Circuit. Pet. App. 9a. In analyzing the term "final decision" under Section 16(a)(3), the court of appeals explained that it would "proceed from a different position than circuits such as the Seventh Circuit" that had accorded " 'talismanic significance' . . . to the distinction between independent and embedded proceedings." *Id.* at 10a (citation omitted) (quoting *Napleton* v. *General Motors Corp.*, 138 F.3d 1209, 1211 (7th Cir. 1998). In doing so, the court of appeals acknowledged that its rejection of the independent/embedded framework was outcome determinative because, if it "followed the

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[4] The court of appeals also noted that this minority approach was supported by judges who had issued dissenting opinions in cases in the Seventh and Ninth Circuits. Pet. App. 9a (citing *Napleton*, 138 F.3d at 1214-15 (Wood, J., dissenting) and *McCarthy*, 122 F.3d at 1246-47 (Pregerson, J., dissenting)).

other circuits (save the Sixth and Tenth) and attached excessive significance to the 'embedded' versus 'independent' proceeding distinction," then it would "lack jurisdiction here." *Id.* at 11a.[5]

Rejecting what it characterized as a " 'myopic' " reliance on the "embedded/independent distinction," the Eleventh Circuit "decline[d]" to adopt the majority rule. Pet. App. 8a, 11a. Instead, it stated that the intent of Section 16 was to "clear away the deadwood" and to " 'furnish a clear rule for appealability of orders relating to arbitration proceedings.' " *Id.* at 12a. (quoting *Napleton*, 138 F.3d at 1217 (Wood, J., dissenting)). Ignoring the fact that the "embedded/independent" distinction provided just such a clear rule, the court of appeals looked instead to statements in the legislative history of Section 16 to conclude that an " '[a]ppeal can be taken from . . . a final judgment dismissing an action in deference to arbitration.' " *Id.* at 13a (quoting *Arnold*, 920 F.2d at 1274-75). Specifically, the court of appeals criticized the analysis by the majority of the other Circuits, *id.* at 14a, and held that the district court's "order compelling arbitration was an appealable 'final decision' under 9 U.S.C. § 16(a)(3)," *id.* at 15a.

Second, on the merits, the Eleventh Circuit considered whether the arbitration provision was unenforceable. While paying lip service to the " 'strong federal policy favoring arbitration' " and recognizing that "procedural apparatus of an arbitration 'should not make an arbitration clause unenforceable,' " Pet. App. 15a (quoting

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[5] The panel noted that the dismissal by the district court in this case was "with prejudice," Pet. App. 14a, and that was a "feature" not present "in most" cases "relying on the embedded/independent distinction." *Id.* Of course, the cases applying the majority view "did not clearly state the nature of the dismissal," *id.*, because that factor has no bearing on the bright-line test that they had adopted to determine whether an order compelling arbitration was a "final decision" under Section 16(a)(3).

Paladino v. *Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998)), the court of appeals ignored these principles in ruling that the arbitration provision was unenforceable because it "fail[ed] to provide the minimum guarantees required to ensure that [respondent's] ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration." *Id.* at 18a.

In doing so, the court of appeals failed to identify any provision of TILA that would be frustrated by arbitration of respondent's claims. Nor could the court of appeals identify any evidence that arbitration of respondent's statutory claims would result in the imposition of substantial arbitration costs or that she would bear those costs. Indeed, the Eleventh Circuit ignored the fact that the arbitration provision expressly provided that the arbitrator would have "all powers provided by the law." Pet. App. 57a. Instead, it relied upon the *absence* of any record evidence on these issues to rule that the arbitration provision "raises serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses that may curtail or bar a plaintiff's access to the arbitral forum." *Id.* at 17a. While it acknowledged that (1) the arbitration "clause is silent on the subject of arbitration fees and costs," *id.* at 19a, and (2) that there was *no* evidence regarding the amount or apportionment of those costs, the Eleventh Circuit nevertheless resolved that failure of proof *against* arbitration by speculating that respondent "*might* be required to bear substantial costs of the arbitration even if she were to prevail." *Id.* (emphasis added).

Petitioners, joined by *amici curiae*, sought rehearing of the court of appeals' decision because, if allowed to stand, it could jeopardize thousands, if not millions of arbitration agreements that do not specifically identify the costs associated with arbitration or provide that the claimant

will not bear the costs of pursuing arbitration. The court of appeals denied the petition for rehearing. Pet. App. 55a-56a.

REASONS FOR GRANTING THE PETITION

Further review of the decision of the Eleventh Circuit is necessary in this case to ensure the proper and uniform resolution of a recurring and important issue of appellate jurisdiction that has sharply divided the courts of appeals. Specifically, the case squarely presents the issue whether, under Section 16(a)(3) of the FAA, a court of appeals has jurisdiction over an appeal from a district court order dismissing a case so that it may be resolved through arbitration in accordance with the agreement of the parties.

The clear majority of circuit courts answer no, (see note 3, *supra*), resolving this issue by analyzing the nature of the underlying action to determine whether an order compelling arbitration is truly a "final decision" under Section 16(a)(3). Where the underlying action seeks only a determination regarding arbitrability—*i.e.*, an independent proceeding—an order compelling arbitration is "final" and immediate appeal is authorized under Section 16(a)(3). Where the underlying action seeks relief other than an order requiring or prohibiting arbitration—*i.e.*, an embedded proceeding—an order compelling arbitration is non-final and cannot be appealed immediately under Section 16(a)(3). The majority rule provides a bright-line, workable standard that implements the language of Section 16 and furthers the strong federal policy favoring arbitration that Section 16 was designed to foster.

While recognizing that the vast majority of circuit courts had adopted this standard, the Eleventh Circuit in this case expressly rejected it in favor of the minority approach adhered to by two other courts of appeals. See *Armijo* v. *Prudential Ins. Co.*, 72 F.3d 793, 797, 799 (10th Cir. 1995); *Arnold* v. *Arnold Corp.*, 920 F.2d 1269, 1275-76 (6th Cir. 1990). These courts of appeals

reject the "independent/embedded" framework and instead employ a case-by-case analysis developed largely on the basis of their review of statements culled from the legislative history of Section 16. Specifically, the minority approach looks to the label affixed by the district court to an order compelling arbitration as the means for determining whether such order constitutes a "final decision" immediately appealable under Section 16(a)(3). This minority approach undermines the express purpose of the FAA by forcing parties to appeal when there is doubt, thereby causing delay and increasing the costs of the arbitration process even when a district court has concluded that claims brought in a lawsuit should, in accordance with the parties' agreement, be resolved in an arbitration.

The Court should grant certiorari to resolve this dispute and adopt the majority view that dismissals in favor of arbitration are not appealable where the relief sought in the district court is broader than a determination whether a controversy is subject to arbitration. This case squarely presents that controversy. Indeed, the Eleventh Circuit correctly acknowledged that if it "followed the other circuits (save the Sixth and Tenth)," then it would, contrary to its ultimate conclusion, "lack jurisdiction here." Pet. App. 11a. In short, this case presents a recurring issue of paramount importance to the congressional scheme governing arbitration under the FAA that has generated substantial conflicts among the courts of appeals.

Even if the court of appeals had jurisdiction to review the district court's order compelling arbitration, the Eleventh Circuit's analysis and holding that the arbitration provision was unenforceable independently calls for plenary review by this Court. While recognizing that the arbitration provision was "silent" on issues such as the filing fees, arbitrators' fees and other "costs of arbitration," the court of appeals' approach adopted a presumption *against*

arbitration and imposed the burden of proof on petitioners to establish that arbitration would not undermine respondent's ability to vindicate her statutory rights. That approach conflicts with clear rulings by this Court and decisions of the courts of appeals that properly interpret such provisions in light of the strong federal policy favoring arbitration and impose the burden of proving unenforceability on the party seeking to avoid arbitration.

If left unreviewed, the decision below would have a dramatic effect on the ability of parties to order their affairs by adopting arbitration as their chosen means to resolve potential disputes. Under the Eleventh Circuit's analysis, an arbitration agreement must anticipate and expressly address in a comprehensive manner all of the potential costs and procedural issues associated with arbitration lest an omission be construed *against* arbitration, rendering the agreement to arbitrate unenforceable.

I. THE CASE SQUARELY PRESENTS AN IMPORTANT ISSUE REGARDING THE SCOPE OF APPELLATE JURISDICTION OF ORDERS DISMISSING CASES IN FAVOR OF ARBITRATION UNDER THE FEDERAL ARBITRATION ACT THAT HAS SHARPLY DIVIDED THE COURTS OF APPEALS.

The decision of the court of appeals deepens an already mature conflict among the Circuits on the recurring issue of whether an order compelling arbitration in "embedded proceedings" is a "final decision with respect to an arbitration" subject to immediate review under 9 U.S.C. § 16(a)(3). As acknowledged by the court of appeals in this case, the decision below is flatly inconsistent with holdings by five other courts of appeals and conflicts with the reasoning of at least three others. Pet. App. 7a-9a. By contrast, the legal standard adopted below is supported by that of two other courts of appeals. Further review by this Court is plainly warranted to provide uniformity on a fundamental issue involving the FAA.

a. On one side of this legal divide are courts of appeals that distinguish between "independent" and "embedded" proceedings as the means for determining whether a district court order compelling arbitration is "a final decision with respect to an arbitration that is subject to [Title 9]." 9 U.S.C. § 16(a). These courts have held that an order compelling arbitration in an embedded proceeding *cannot* be appealed immediately, regardless of whether the district court enters a stay or dismisses the case in its entirety.

In *Seacoast Motors of Salisbury, Inc.* v. *Chrysler Corp.*, 143 F.3d 626 (1st Cir. 1998), the First Circuit dismissed for want of jurisdiction an appeal by an auto dealership from an order compelling arbitration and dismissing the case with costs. *Id.* at 627. Recognizing that "other circuits have been divided on the issue," *id.* at 628, the *Seacoast* Court sided with the "circuits [that] have focused on the distinction between embedded and independent proceedings to determine whether jurisdiction exists over an appeal from a dismissal of an order favoring arbitration," *id.* Expressly rejecting the analysis of several other courts of appeals, *id.*, and adopting the analysis of the Ninth, Eighth, Seventh, Fifth, and Fourth Circuits, *id.* at 628-29, the *Seacoast* Court held that it lacked jurisdiction under Section 16(a)(3) to review whether an order compelling arbitration was proper and explained that its analysis "avoid[ed] elevating form over substance and promote[d] both the pro-arbitration purposes of the FAA and the institutional goal of avoiding piecemeal appeals and systemic delays." *Id.* at 629.

The ruling in *Seacoast* built directly on the Seventh Circuit's decision in *Napleton* v. *General Motors Corp.*, 138 F.3d 1209 (7th Cir. 1998). There, the court of appeals considered whether the dismissal of an embedded case " 'to allow for arbitration' constitutes an appealable —i.e. final—decision." *Id.* at 1212. Noting that other

circuits had addressed similar questions without reaching "unanimity in their answers," *id.*, the Seventh Circuit explained that "the *jurisdictional lodestar* of appealability is whether the decision favoring arbitration is from an independent or from an embedded proceeding," *id.* (emphasis added). The Seventh Circuit held that "it is the nature of the underlying action, not the style of the district court's decision requiring arbitration, that determines whether we have jurisdiction over appeals from decisions granting arbitration." *Id.* In contrast, adoption of the contrary rule, would render determinative "whether the district judge dismissed rather than stayed an action," thereby permitting the district court to manipulate whether a "party seeking to avoid arbitration could appeal immediately," an arbitrary result that Congress could not have intended. *Id.* at 1213. Accordingly, the *Napleton* court concluded that it would have "jurisdiction over appeals from independent proceedings" and would "decline to find jurisdiction over appeals from embedded proceedings." *Id.* at 1212.[6]

Similarly, in *McCarthy* v. *Providential Corp.*, 122 F.3d 1242 (9th Cir. 1997), the Ninth Circuit considered an appeal from an order requiring plaintiffs to arbitrate their claims under the TILA and dismissing the underlying action. *Id.* at 1243. Applying the bright-line embedded/independent "analysis" that had "been followed by the majority of courts," the *McCarthy* Court concluded that the order compelling arbitration arose in an embedded proceeding and therefore was not a "final decision" under 9 U.S.C. § 16(a)(3). *Id.* at 1244 (identifying conflicting analysis by Tenth and Sixth Circuits). Relying on precedent from the Eighth Circuit, the *McCarthy* Court

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[6] *Accord Perera* v. *Siegel Trading Co.*, 951 F.2d 780, 786 (7th Cir. 1992) (holding that order compelling arbitration and entering judgment under Rule 54(b) was not a final decision under Section 16(a)(3)).

rejected a separate test for cases where the district court ordered dismissal, rather than a stay, of the judicial proceeding because that distinction would "ignor[e] the clear dictates of the FAA" and would contravene the intent of Congress. *Id.* at 1245.

In *Gammaro* v. *Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994), the Eighth Circuit dismissed an appeal from the district court's decision ordering the parties to proceed to arbitration to resolve allegations arising under the TILA and dismissing plaintiffs' class action allegations. *Id.* at 94. Relying on "a number of well-reasoned decisions handed down" by other courts of appeals, the Eighth Circuit agreed that in enacting Section 16, "Congress simply 'built upon the distinction the courts had previously recognized between so-called "independent" proceedings and so-called "embedded" proceedings.' " *Id.* at 95 (quoting *Filanto*, 984 F.2d at 60) (noting that Sixth Circuit adopted conflicting analysis). The *Gammaro* court explained that this "bright-line rule" was a "product of Congress's purpose" which would be undermined if the court of appeals adopted "a more attenuated, case-by-case determination of jurisdiction." *Id.* at 96 (citing *Humphrey* v. *Prudential Sec. Inc.*, 4 F.3d 313, 318 (4th Cir. 1993)). Indeed, warning that it would "brook no delay in requiring compliance with orders compelling arbitration," the Eighth Circuit made clear that "[f]uture appeals from such orders in embedded proceedings will be subject to dismissal without opinion, sua sponte if necessary." *Id.*

Finally, in *Humphrey* v. *Prudential Securities Inc.*, 4 F.3d 313 (4th Cir. 1993), the Fourth Circuit dismissed for lack of jurisdiction an appeal of a decision ordering arbitration of all the substantive claims raised in a complaint. *Id.* at 314, 319. There, the district court "retained jurisdiction through its stay only to enforce or vacate a forthcoming arbitration award." *Id.* at 317. As

a result, the Court was required to address "whether an embedded action may give rise to a final decision subject to section 16(a)(3) review when all the claims in which the arbitration issue is embedded are disposed of." *Id.* at 318. Concluding that Congress intended courts to rely upon " 'preexisting judicial interpretation' " to define the term " 'final decision,' " the Fourth Circuit ruled that " 'arbitration orders [are] final if arbitration is the sole issue before the court and interlocutory if raised in an embedded proceeding.' " *Id.* (alteration in original) (quoting *Perera* v. *Siegel Trading Co.*, 951 F.2d 780, 784, 785 (7th Cir. 1992)). Accordingly, the *Humphrey* Court held "that an embedded proceeding may not give rise to a final decision subject to section 16(a)(3) review." *Id.*[7]

Taken together, these cases establish that the clear majority of the courts of appeals have adopted the embedded/independent framework as the "jurisdictional lodestar of appealability." *Napleton*, 138 F.3d at 1212. Accordingly, the order in this case compelling arbitration in an embedded proceeding could not give rise to a "final decision" under section 16(a)(3) in those Circuits and thus the arbitration proceeding would have had to run its course before the courts could intervene. By the happenstance of geography, that majority rule was not followed by the court below.

b. On the opposite side of this debate are decisions by the Sixth and Tenth Circuits and the decision by the

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[7] *See also John Hancock Mut. Life Ins.* v. *Olick*, 151 F.3d 132, 135-36 (3d Cir. 1998) (adopting embedded/independent analysis to assess whether order constitutes final decision appealable under 9 U.S.C. § 16(a)(3)); *Altman Nursing, Inc.* v. *Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996) ("[T]here can never be an interlocutory appeal from an embedded proceeding"); *Filanto, S.p.A.* v. *Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993) (holding that orders directing arbitration in embedded proceedings "are not immediately appealable").

Eleventh Circuit in this case, each of which has exercised jurisdiction under 9 U.S.C. § 16(a)(3) to review arbitration orders in embedded proceedings.

The earliest of these cases was *Arnold* v. *Arnold Corp.*, 920 F.3d 1269 (6th Cir. 1990), where the Sixth Circuit considered an appeal from an order compelling arbitration and dismissing plaintiff's claims under the Securities and Exchange Act of 1934. *Id.* at 1272, 1273. Relying on snippets culled from the legislative history, the Sixth Circuit concluded, in a circular fashion, that "a final order [under section 16] is one which dismisses 'an action in deference to arbitration' and enters a final judgment." *Id.* at 1275 (quoting Committee on the Judiciary, Section by Section Analysis on S1482, 134 Cong. Rec. S16,284 (daily ed. Oct. 14, 1988)). The Sixth Circuit argued that by enacting Section 16, Congress "reject[ed] the prior distinction made between orders brought solely to compel specific performance of an agreement to arbitrate and orders granting or denying requests to compel arbitration entered into . . . in an ongoing action for legal relief on the underlying claims." *Id.* at 1276. See also *Security Watch, Inc.* v. *Sentinel Sys., Inc.*, 176 F.3d 369, 371 (6th Cir. 1999) (relying on *Arnold* to conclude that "an order dismissing an action in favor of arbitration is a final order appealable under § 16(a)(3)"), *petition for cert. filed*, 68 USLW 3291 (U.S. Oct. 18, 1999) (99-669).

Similarly, in *Armijo* v. *Prudential Insurance Co.*, 72 F.3d 793 (10th Cir. 1995), the Tenth Circuit held that it had jurisdiction to review the district court's decision compelling arbitration of plaintiffs' federal and state discrimination claims and dismissing plaintiff's lawsuit. *Id.* at 797. The Tenth Circuit drew a distinction between orders compelling arbitration in which the lawsuit was stayed—which were "non-final"—and orders compelling arbitration and dismissing the proceedings—which were

"final order[s]" for which 9 U.S.C. § 16(a)(3) expressly provided immediate appeal. *Id.* Because the district court's decision ordering arbitration also dismissed the case—rather than entering a stay—the Tenth Circuit concluded that it was a "final order" expressly appealable under 9 U.S.C. § 16(a)(3). *Id.*

Finally, in this case, the Eleventh Circuit acknowledged the conflict among the courts of appeals, recognized that the case before it implicated that conflict, and embraced the minority position that an order compelling arbitration and dismissing the case is a "final decision" for which an immediate appeal lies under 9 U.S.C. § 16(a)(3). *First,* the Eleventh Circuit identified the deep conflict among the courts of appeals on the question "whether a district court's order compelling arbitration in an embedded proceeding is an appealable 'final decision' where it dismisses the remaining claims." Pet. App. 9a. *Second,* the court of appeals acknowledged that this case implicated that conflict because, if it followed "the other circuits (save the Sixth and the Tenth)," then it would "lack jurisdiction here." *Id.* at 11a. *Third,* the court of appeals placed itself firmly in the camp with the Sixth and Tenth Circuits by rejecting reliance on the "embedded/independent" framework and adopting instead a case-by-case approach where "appeals should be available where there is nothing left to be done in the district court." *Id.* at 13a.

c. As demonstrated above, the issue whether an order dismissing a case in favor of arbitration is a "final decision" under 9 U.S.C. § 16(a)(3) has generated a deep and persistent conflict among the courts of appeals. Courts on both sides of this debate have acknowledged the existence of the conflict and criticized the approach taken by the other side. See, *e.g.*, *Seacoast*, 143 F.3d at 628 ("[O]ther circuits have been divided on this issue."); Pet. App. 9a ("We are thus faced with a circuit split on the question whether a district court's order

compelling arbitration in an embedded proceeding is an appealable 'final decision' where it dismisses the remaining claims."). Under the majority view, it is clear that the Eleventh Circuit would have lacked jurisdiction to review the district court's order because this case indisputably is an embedded proceeding in which the arbitration issue arose in the midst of claims for other relief. See, *e.g.*, *Perera*, 951 F.2d at 784 (defining "embedded" proceeding); *Filanto S.p.A.* v. *Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993) (same). Accordingly, this case presents an ideal vehicle for resolving the dispute regarding the proper analysis for determining whether an order is a final decision under Section 16(a)(3) of the FAA.

Moreover, this issue is a matter of considerable importance to the statutory scheme governing arbitration adopted by Congress in 1988. Courts on both sides of the conflict acknowledge that the 1988 amendments sought to promote arbitration by delaying the review of decisions in favor of arbitration until *after* the arbitration had taken place. See, *e.g.*, *Arnold*, 920 F.2d at 1274 (noting that under section 16, "interlocutory orders directing the parties to arbitration are not appealable"); *Filanto*, 984 F.2d at 60 (Congress "endeavored to promote appeals from orders barring arbitration and limit appeals from orders directing arbitration"). Absent corrective action by this Court, however, that legislative policy favoring arbitration over litigation will be frustrated by the circuits applying the minority rule. In those circuits, orders dismissing an action in favor of arbitration may result in lengthy appeals that will result in unnecessary delay and expense associated with the appellate process even before an arbitration has begun. See, *e.g.*, *Napleton*, 138 F.3d at 1214 ("the most economical approach is not to allow an intermission for appellate review, but rather for the parties to proceed expeditiously to arbitration"). That

result cannot be reconciled with the language of 16(a)(3), which permits an appeal only from "a final decision with respect to an arbitration" or with the strong federal policy favoring arbitration over litigation.

Finally, the minority approach adopted by the Sixth, Tenth and Eleventh Circuits allows district courts to manipulate the jurisdiction of an appellate court based solely on the label they choose to affix to orders compelling arbitration, an absurd result that Congress simply could not have intended. See, *e.g.*, *id.* at 1213 (identifying instance where district court entered Rule 54(b) judgment because it "seemingly wanted the appellate court to extend jurisdiction over [the] appeal"). As the court of appeals in *McCarthy* explained when it rejected the minority approach:

> [D]istinguishing between stays and dismissal for purposes of appellate review would condition the result on the district court's decision. If the circumstances compelled the court to stay the action, the case would proceed to an arbitrator; if the court dismissed all claims the case could be appealed immediately. We do not believe that Congress intended this arbitrary result when it barred appellate review of interlocutory orders compelling arbitration. We interpret the bar on appellate review to be just that, regardless of the terminology used by the trial court.

122 F.3d at 1245; see also *Napleton*, 138 F.3d at 1213 (refusing to "elevate the form of a district court's order over its substance"); *Seacoast*, 143 F.3d at 629 (same).

In short, this case squarely presents an issue that has generated an acknowledged conflict among the courts of appeals on an important and recurring issue of federal jurisdiction. Further review by this Court is accordingly warranted.

II. THE COURT OF APPEALS' DECISION THAT THE ARBITRATION CLAUSE WAS UNENFORCEABLE PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS GENERATED A CONFLICT AMONG THE COURTS OF APPEALS

Even if the panel had jurisdiction to reach the merits prior to the arbitration, it resolved the challenge to the enforceability of the arbitration provision in a manner that, if left unreviewed, would have a profound effect on the ability of parties to choose arbitration instead of litigation as the means by which they wish to resolve their disputes. Under the court of appeals' decision, arbitration provisions that are "silent" as to the costs of arbitration or as to the manner in which those costs wil be allocated among the parties would be unenforceable because those costs "might" be substantial and the claimant "might" be required to bear them. That conclusion contravenes the strong federal interest favoring arbitration expressed in decisions by this Court and conflicts with decisions by the courts of appeals.

Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract." 9 U.S.C. § 2. In *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), this Court explained that "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements," *id.* at 24, and therefore, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability," *id.* at 24-25; *accord Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Moreover, the "duty to enforce arbitra-

tion agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987); see also *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (same). Indeed, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited development of arbitration as an alternative means of dispute resolution. *Id.* at 626-27. Accordingly, "there is no reason to assume at the outset that arbitrators will not follow the law." *McMahon*, 482 U.S. at 232. In fact, review of arbitration awards, though limited, "is sufficient to ensure that arbitrators comply with the requirements of the statute." *Id.* To be sure, while the FAA's mandate in favor of arbitration agreements "may be overridden by a contrary congressional command," the "burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory right at issue." *Id.* at 226-27.

Here, however, the panel trampled on these settled standards in its rush to invalidate the arbitration provision. By contrast, the enforceability of the arbitration provision involved in this case has been upheld by the Alabama Supreme Court on numerous occasions. *Green Tree Financial Corp.* v. *Vintson*, No. 1972191, 1999 WL 778496, at *6 (Ala. Oct. 1, 1999); *Green Tree Financial Corp.* v. *Wampler*, Nos. 1970983, 191029, 1999 WL 667292, at *8 (Ala. Aug. 27, 1999); *Ex Parte Smith*, 736 So. 2d 604, 612-13 (Ala. 1999); *Patrick Home Ctr. Inc.* v. *Karr*, 730 So. 2d 1171, 1174 (Ala. 1999); *Ex Parte Parker*, 730 So. 2d 168, 172 (Ala. 1999); *Green Tree Financial Corp.* v. *Davis*, 729 So. 2d 329, 329 (Ala. 1999); *Ex Parte Napier*, 723 So. 2d 49, 54 (Ala. 1998); *Green Tree Agency, Inc.* v. *White*, 719 So. 2d 1179, 1180 (Ala. 1998); *Ex Parte Gates*, 675 So. 2d 371, 375

(Ala. 1996).[8] Indeed, in *Wampler*, the Alabama Supreme Court rejected the analysis of the Eleventh Circuit in this case and instead held that "[w]here a . . . contract is silent on a particular question," a reviewing court must not "indulg[e] an assumption that the proof would support a 'worst case' scenario." 1999 WL 667292, at *6. Indeed, the Third Circuit has expressly upheld the Green Tree arbitration provision against a challenge that it was unconscionable. *Harris* v. *Green Tree Financial Corp.*, 183 F.3d 173, 182-84 (3d Cir. 1999).

Not only is the enforceability of this specific provision a matter of conflict among the lower courts, but the Eleventh Circuit's fundamental approach to enforceability is flatly at odds with decisions of other courts of appeals and with the strong federal policy favoring arbitration. *First*, the panel disregarded the obligation to resolve doubts regarding arbitrability in accordance with the " 'the federal policy favoring arbitration.' " *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone*, 460 U.S. at 24). Instead, the panel resolved doubts *against* arbitration by assuming the worst possible outcome. That analysis conflicts with the Eighth Circuit's decision in *Dobbins* v. *Hawk's Enterprises*, No. 99-1582, 1999 WL 1256184 (8th Cir. Dec. 23, 1999) and the District of Columbia Circuit's decision in *Cole* v. *Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997).

In *Dobbins*, plaintiffs filed suit claiming damages based on alleged statutory violations of TILA. Defendant sought to compel arbitration. After initially compelling

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[8] Further, this arbitration clause has been scrutinized and upheld by other federal and state courts throughout the country. *See, e.g., Dorsey* v. *H.C.P.S. Sales, Inc.*, 46 F. Supp. 2d 804, 806-08 (N.D. Ill. 1999); *In re Pate*, 198 B.R. 841, 844-46 (Bankr. S.D. Ga. 1996); *Lackey* v. *Green Tree Financial Corp.*, 498 S.E.2d 898, 902-05 (S.C. Ct. App. 1998); *Pierman* v. *Green Tree Financial Servicing Corp.*, 933 P.2d 955, 956-57 (Okla. Ct. App. 1997).

arbitration, the district court ultimately ruled that the arbitration provision was unenforceable because the "final fee determination" of $23,000 precluded the Dobbinses "from availing themselves of the arbitral forum." *Id.* at *1. The Eighth Circuit reversed. It held that the Dobbinses were required "to fully explore" whether they could reduce the fees by seeking a waiver or by making a "more realistic demand for damages." *Id.* at *2 & n.3. Moreover, even if these avenues proved to be fruitless and failed to reduce the arbitration fee to a reasonable amount, the court of appeals directed the district court to "accept appellant's offer to pay the arbitration fees." *Id.* at *6 (footnote omitted).

Similarly, in *Cole*, the court of appeals considered an arbitration agreement that was "silent" on the issue of who would bear the costs of arbitration. 105 F.3d at 1485. Unlike the Eleventh Circuit, however, the *Cole* Court concluded that "the arbitration agreement . . . [was] valid and enforceable" because it interpreted the agreement to require the employer "to pay all arbitrators' fees in connection with the resolution of [the employee's statutory] claims." *Id.* at 1485, 1486. In doing so, the District of Columbia Circuit explained that it adopted that interpretation "to uphold the validity of the parties' contract." *Id.* at 1486.

Second, the Eleventh Circuit aggravated its error by improperly imposing upon petitioners the burden of disproving the parade of horribles imagined by the court. For example, when petitioners informed the panel that "the arbitrator may apportion the fees of the arbitration in his award," the panel responded that petitioners' failed to "guarantee that a consumer successfully arbitrating under [the arbitration clause] will not be saddled with a prohibitive costs order." Pet. App. 18a. When petitioners informed the panel that "no filing fees are required," the

panel responded that "whether there are fees is likely to depend on who conducts the arbitration, something the arbitration clause is silent about." *Id.*

That analysis conflicts with the Seventh Circuit's decision in *Koveleskie* v. *SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir.), *cert. denied*, 120 S. Ct. 44 (1999) and the First Circuit's decision in *Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 15-16 (1st Cir. 1999). In those cases, plaintiffs argued that an arbitration agreement was unenforceable in the context of claims arising under Title VII because the industry arbitrators "routinely fail to follow Title VII's fee-shifting principle by refusing to award statutory attorneys' fees to prevailing plaintiffs and by charging plaintiffs expensive forum fees." *Koveleskie*, 167 F.3d at 366; *Rosenberg*, 170 F.3d at 15. In rejecting that claim, the Seventh and First Circuits explained that the record failed to establish that "a plaintiff is asked to bear forum fees." *Koveleskie*, 167 F.3d at 366 (internal quotation marks omitted); *accord Rosenberg*, 170 F.3d at 15.

The panel below sought to distinguish *Rosenberg*, but in doing so highlighted that it had shifted the burden of proof to petitioners. Specifically, the panel below stated that

> the court in *Rosenberg* had before it a record suggesting that most successful arbitral claimants were awarded fees and costs; we lack similar information about how claimants fare under Green Tree's arbitration clause.

Pet. App. 18a-19a. But in *Rosenberg*, the party seeking to invalidate the arbitration attempted to satisfy her burden of proof by "plac[ing] in the record" evidence of "thirty-three arbitration cases." 170 F.3d at 16. The record developed by Rosenberg, however, simply did not support the conclusion about the alleged misconduct of

arbitrators because "only one plaintiff who prevailed on statutory grounds was denied fees and costs." *Id.*

In this case, as in *Rosenberg* and *Koveleskie*, the record evidence did not support the conclusion that the arbitrators would violate governing federal statutes and require respondent to "bear substantial costs of the arbitration even if she were to prevail." Pet. App. 19a. Nevertheless, the panel concluded that this absence of record evidence provided a basis for invalidating the arbitration provision. In doing so, the Eleventh Circuit shifted the burden of proof onto petitioners in contravention of well-established precedent. *McMahon*, 482 U.S. at 227 ("The burden is on the party opposing arbitration . . . ."). Indeed, because there was *no* evidence in the record supporting the conclusion that the arbitrator would disregard the law, the panel decision further violated settled precedent because it assumed, without any legitimate basis, that the arbitrator would disregard the statutory requirements of TILA. *McMahon*, 482 U.S. at 232 ("[T]here is no reason to assume at the outset that arbitrators will not follow the law. . . .").[9]

In sum, the Eleventh Circuit's decision violates well-settled principles that require a reviewing court to resolve doubts about the arbitrability of statutory claims in *favor* of arbitration and to impose the burden of proving that an arbitration provision is unenforceable squarely on the party *opposing* the arbitration. Here, the Eleventh Cir-

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[9] Moreover, in contrast to the decision below, the First and Seventh Circuits ruled that even if an arbitrator might impose, in a particular case, unreasonable costs in violation of federal statutory rights, that result "could be presented by the [claimant] to the reviewing court" *after* the arbitration under section 10 of the FAA. *Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1st Cir. 1999) (citing *Cole* v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1486 (D.C. Cir. 1997)); *accord Koveleskie* v. *SBC Capital Markets, Inc.*, 167 F.3d 361, 366 (7th Cir. 1999).

cuit, resolved any and all doubts *against* arbitration and imposed the burden of proof squarely—and improperly—on the party *seeking* arbitration of the underlying statutory claims. The decision below conflicts with numerous appellate decisions and sets a dangerous precedent that, if left uncorrected, would sow substantial confusion in an area of law where settled and clear standards are of paramount importance. The error is doubly disturbing because it is the product of an equally fundamental error by the court below in exercising appellate jurisdiction. Because the holding below raises two fundamental questions arising out of the proper enforcement of the FAA, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 98-6055

LARKETTA RANDOLPH, on behalf of herself and all others similarly situated,
Plaintiff-Appellant,

v.

GREEN TREE FINANCIAL CORP.—ALABAMA; and GREEN TREE FINANCIAL CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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June 22, 1999

Before HATCHETT and CARNES, Circuit Judges, and FARRIS *, Senior Circuit Judge.**

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* Honorable Jerome Farris, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

** This decision is rendered by a quorum, due to the retirement of then-Chief Judge Hatchett on May 14, 1999. 28 U.S.C. § 46(d).

CARNES, Circuit Judge:

Plaintiff Larketta Randolph appeals the district court's order compelling arbitration of her claim against defendants Green Tree Financial Corporation and Green Tree Financial Corp.—Alabama (collectively, "Green Tree"), which financed her purchase of a mobile home. She alleges that Green Tree's financing documents violate the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"), that its mandatory arbitration requirement violates the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f ("Equal Credit Act"), and that the TILA precludes the arbitration of disputes arising under that legislation. The district court ordered the parties to proceed to arbitration and dismissed the action with prejudice. Green Tree challenges our jurisdiction to hear this appeal. We conclude that the district court's judgment was an appealable "final decision." We also hold that the arbitration agreement in this case defeats the remedial purposes of the TILA and is unenforceable.

I. BACKGROUND

This case stems from Randolph's January 25, 1994, purchase of a mobile home from Better Cents Home Builders, Inc., in Opelika, Alabama. Randolph financed her purchase through Green Tree Financial Corp.—Alabama, a wholly-owned subsidiary of Green Tree Financial Corporation. Randolph contends that Green Tree required her to obtain "vendor's single interest" insurance, which protects a vendor or lienholder against the costs of repossession in the event of default, but did not mention this requirement in its Truth in Lending Act disclosure.

Randolph's retail installment contract with Better Cents, which names Green Tree Financial Corp. as the assignee,

contains an arbitration provision. It reads, in pertinent part:

> 17. ARBITRATION: All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire Contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s). This arbitration Contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes will be subject to binding arbitration in accord with this Contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the Contract . . . [including] money damages, declaratory relief, and injunctive relief. Notwithstanding anything hereunto the contrary, Assignee retains an option to use judicial or nonjudicial relief to enforce

> a security agreement relating to the Manufactured Home secured in a transaction underlying this arbitration agreement, to enforce the monetary obligation secured by the Manufactured Home or to foreclose on the Manufactured Home. . . . The initiation and maintenance of an action for judicial relief in a court [on the foregoing terms] shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this Contract, including the filing of a counterclaim in a suit brought by Assignee pursuant to this provision.

Randolph brought this suit in district court in January, 1996, alleging that Green Tree [1] violated the TILA by failing to include the requirement of vendor's single interest insurance in its TILA disclosure, and violated the Equal Credit Act by requiring arbitration of all claims.[2] She sought certification of a class of individuals who had entered into similar agreements with Green Tree. In response, Green Tree moved to compel Randolph to arbitrate her complaint pursuant to the arbitration agreement. It also moved to stay the action pending arbitration or, in the alternative, to dismiss it.

The district court granted the motion to compel arbitration, and declined to certify a class. *See Randolph v. Green Tree Fin. Corp.*, 991 F.Supp. 1410, 1424-25 (M.D.Ala. 1997). Because it concluded that all the issues raised in Randolph's complaint must be submitted to arbi-

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[1] Her suit also named as a defendant Green Tree Financial Servicing Corporation. The district court dismissed this party from the action.

[2] In her initial complaint, Randolph also alleged fraud in the inducement of the arbitration agreement, but she omitted that claim in her amended complaint. It was deemed waived by the district court, and Randolph does not raise it on appeal.

tration, it denied the motion to stay the action and instead dismissed her claims with prejudice. *See id.* Randolph filed this appeal. Green Tree subsequently moved to dismiss the appeal for lack of jurisdiction.

II. STANDARD OF REVIEW

The jurisdictional issue is a question of law, which we review *de novo. See, e.g., Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir.1998). We review *de novo* the district court's order compelling arbitration. *See, e.g., Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 756 (11th Cir.1993).

III. ANALYSIS

A. WHETHER THE DISTRICT COURT'S ORDER WAS APPEALABLE AS A "FINAL DECISION" UNDER THE FEDERAL ARBITRATION ACT

As a threshold matter, we decide whether we have jurisdiction over this appeal. Though we would normally look to 28 U.S.C. § 1291 to determine our jurisdiction over the dismissal of this action, "Congress has set forth special rules governing appeals from a district court's arbitration order." *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1243 (9th Cir.1997). Those rules are set forth in section 16 of the Federal Arbitration Act, 9 U.S.C. § 16. That provision states:

> (a) An appeal may be taken from—
>
> (1) an order—
>
> (A) refusing a stay of any action under section 3 of this title,
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16. Put succinctly, the provision "identifies two broad classes of cases in which an appeal is possible, and one in which it is not." *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1216 (7th Cir. 1998) (Wood, J., dissenting). Subsection § 16(a)(1)-(2) allows appeals "from orders that somehow prevent arbitration from going forward"; conversely, § 16(b) bars appeals "from interlocutory orders that in one way or another allow the arbitration to proceed." *Id.*

The other circumstance under which appeals are allowed is set out in § 16(a)(3)—"a final decision with respect to an arbitration that is subject to this title." The question here is whether the district court's order compelling arbitration of the issues raised in Randolph's complaint and dismissing her claims with prejudice falls within that category. If it does, we have jurisdiction. If it does not, the parties must proceed to arbitration.

In arguing that we lack jurisdiction, Green Tree distinguishes between "embedded" and "independent" proceedings, a distinction which has been drawn by a number of circuits that have considered § 16(a)(3). An "embedded" proceeding is one in which the arbitration issue arises as part of a broader action dealing with other issues. In this case, for example, Randolph's action alleges a substantive violation of the TILA as well as raising the arbitrability question; indeed, the motion to compel arbitration was filed by the defendant, Green Tree. In an "independent" proceeding, the motion to compel arbitration is the *only* issue before the court.

Several circuits have held that orders compelling arbitration which arise in embedded proceedings must be treated as interlocutory and non-appealable, not as "final decisions" under § 16(a)(3). *See, e.g., John Hancock Mut. Life Ins. Co. v. Olick,* 151 F.3d 132, 135-36 (3d Cir.1998); *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.,* 143 F.3d 626, 628 (1st Cir.1998) ("The general rule governing what constitutes a final decision under section 16 is that an order compelling arbitration is not final, and therefore not immediately reviewable, if the arbitrability issue is 'embedded'. . . ."); *Napleton,* 138 F.3d at 1212 (7th Cir.) ("[T]he jurisdictional lodestar of appealability is whether the decision favoring arbitration is from an independent or from an embedded proceeding."); *McCarthy,* 122 F.3d at 1244 (9th Cir.) (" '[I]f the motion

to compel arbitration is "embedded" in a substantive suit pending before that court, the district court's decision to compel arbitration of some or all of the claims before it is not considered to be final, and therefore not reviewable.' " (quoting *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1302 (9th Cir.1994))); *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 136 (4th Cir.1997); *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir.1996) ("An order involving an embedded proceeding is always an interlocutory order; an order involving an independent claim is always final."); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994); *Filanto, S.p.A. v. Chilewich International Corp.*, 984 F.2d 58, 60-61 (2d Cir. 1993).

In most embedded proceedings treating orders compelling arbitration as interlocutory makes sense, because after the arbitrability issue has been decided, other issues remain in the case for the district court to resolve; so an order directing the parties to proceed to arbitration could not possibly be considered a "final decision" under § 16(a)(3). In cases like this one, however, where the district court's dismissal of the action leaves no additional issues for it to resolve, treating the distinction between embedded and independent proceedings as decisive makes less sense. Nevertheless, a number of circuits have adhered, with a concededly "myopic[]" focus, to the embedded/independent distinction when determining whether they had jurisdiction to hear an appeal under § 16(a)(3). *See Napleton*, 138 F.3d at 1213 ("[T]his Circuit has focused, almost myopically, on whether a proceeding is independent or embedded.").

The circuits taking this approach have insisted that a district court's order compelling arbitration in an embedded proceeding is interlocutory and non-appealable, even if the district court *dismisses* the remaining claims.

See, e.g., Seacoast, 143 F.3d at 628-29 (dismissal of embedded proceeding without prejudice is non-appealable); *Napleton,* 138 F.3d at 1212 (same); *McCarthy,* 122 F.3d at 1244-45 (arbitration order in embedded proceeding not appealable where district court dismissed action and ordered court clerk to close file); *Altman Nursing,* 84 F.3d at 771 (arbitration order in embedded proceeding non-appealable, even though district court's order ended all litigation); *Gammaro,* 15 F.3d at 95-96 (arbitration order non-appealable where court dismissed remaining issues).

By contrast, both the Sixth and Tenth Circuits have taken a less mechanical approach to the question of whether an arbitration order is an appealable "final decision" under § 16(a)(3). In *Armijo v. Prudential Insurance Co. of America,* 72 F.3d 793, 797 (10th Cir.1995), the Tenth Circuit treated the district court's dismissal of the plaintiffs' remaining claims, apparently with prejudice, as an appealable final decision. Similarly, in *Arnold v. Arnold Corp.—Printed Communications for Business,* 920 F.2d 1269, 1276 (6th Cir.1990), the Sixth Circuit recognized its appellate jurisdiction over an order compelling arbitration in an embedded proceeding, relying on the fact that the district court had entered final judgment and had "nothing left . . . to do but execute the judgment." *See also Napleton,* 138 F.3d at 1214-15 (Wood, J., dissenting); *McCarthy,* 122 F.3d at 1246-47 (Pregerson, J., dissenting); *Filanto, S.p.A.,* 984 F.2d at 61 n. 3 (dicta noting that at least a limited appeal might have been available "[h]ad the complaint been dismissed").

We are thus faced with a circuit split on the question whether a district court's order compelling arbitration in an embedded proceeding is an appealable "final decision" where it dismisses the remaining claims. This question is one of first impression in our circuit. In answering it. we begin by recognizing that "final decision" is a term of art

which was of long standing when Congress enacted § 16 (a)(3), and we will therefore take guidance from prior judicial interpretations of the term. *See, e.g., Napleton,* 138 F.3d at 1211. In interpreting this term, however, we proceed from a different position than circuits such as the Seventh Circuit, because we have never accorded the same degree of "talismanic significance," *id.*, that others have to the distinction between independent and embedded proceedings.

Instead, our interpretation of the term "final decision" has generally followed "the simplest traditional definition of finality: the decision has disposed of all the issues framed by the litigation, leaving nothing to be done but execute the order." 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3914.17, at 18-19 (2d ed.1992). *See also Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945) (decision of the district court is final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."). We have taken that approach both with respect to the general provision dealing with the appealability of final decisions of the district courts, 28 U.S.C. § 1291[3] *see, e.g. Shannon v. Jack Eckerd Corp.*, 55 F.3d 561, 563 (11th Cir.1995), and with respect to the FAA itself, *see Thomson McKinnon Securities, Inc. v. Salter,* 873 F.2d 1397, 1399 (11th Cir.1989).[4] *See also Morewitz v. West*

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[3] 28 U.S.C. § 1291 states that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

[4] In *Thomson McKinnon,* we held that under what is now 9 U.S.C. § 16(a)(3), "decisions of the district court are final if they 'end[] the litigation on the merits and leave[] nothing for the [district] court to do but execute the judgment.'" *Thomson McKinnon,* 873 F.2d at 1399 (quoting *Catlin,* 324 U.S. at 233, 65 S.Ct. at 633). We also noted, however, that the finality of an order granting or

of England Ship Owners Mut. Protection & Indem. Ass'n (Luxembourg), 62 F.3d 1356, 1361 (11th Cir.1995) (FAA case holding that decisions of the district court are final if they leave the district court with nothing to do but execute judgment, but relying on 28 U.S.C. § 1291, not 9 U.S.C. § 16(a)(3)).

In most arbitration appeals there will be little difference between the traditional definition of "final decision" and one that relies on the distinction between embedded and independent proceedings. If the district court's order compelling arbitration in a so-called embedded proceeding leaves other issues unresolved, the court will have more left to do than simply execute the judgment, so there will be no final decision. But that is not true in cases such as this one, where the district court dispensed with the remaining issues by dismissing the case. Only if we followed the other circuits (save the Sixth and Tenth) and attached excessive significance to the "embedded" versus "independent" proceeding distinction, instead of applying the venerable definition of "final decision," would we lack jurisdiction here.

That we decline to do. Nothing in the plain language of the statute requires us to make the embedded/independent distinction decisive. Moreover, the history of § 16(a)

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denying a request to compel arbitration may depend on whether the order was "entered in the course of ongoing actions for legal or equitable relief on the underlying claims." *Id.* We held that because the sole question before the district court was subject to arbitration, its decision was final and appealable. We thus recognized the embedded/independent distinction (without using those labels), but did not need to decide whether an order like the one here, dismissing all the plaintiffs' claims in an embedded proceeding with prejudice, is a "final decision." More importantly, we did not attach a "talismanic significance" to the distinction between embedded and independent proceedings, but treated it as a part of our usual inquiry into whether the district court's decision leaves nothing for it to do but execute the judgment.

(3)'s enactment favors our standard reading of "final decision," and counsels against attaching undue significance to the embedded/independent distinction. Section 16 was enacted against the background of the demise of the *Enelow-Ettelson* doctrine, which had employed the old distinction between law and equity to determine when a stay could be appealed. *See Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188, 191-92, 63 S.Ct. 163, 164-65, 87 L.Ed. 176 (1942); *Enelow v. New York Life Ins. Co.*, 293 U.S. 379, 382-83, 55 S.Ct. 310, 311-12, 79 L.Ed. 440 (1935). The Supreme Court, applying the *Enelow-Ettelson* doctrine to arbitration law, acknowledged that the continuing application of this doctrine illustrated "the persistence of outmoded procedural differentiations." *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 184, 75 S.Ct. 249, 254, 99 L.Ed. 233 (1955), but it did so nonetheless, "leaving Congress to make such amendments as it may find proper." *Id.* at 185, 75 S.Ct. at 254.

Ultimately, the Court abandoned the *Enelow-Ettelson* doctrine altogether. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287, 108 S.Ct. 1133, 1142, 99 L.Ed.2d 296 (1988). Soon after, Congress stepped in to "make *Gulfstream*, and the case law that it overruled, largely academic on the arbitration scene" by enacting what is now 9 U.S.C. § 16 as part of the Judicial Improvements and Access to Justice Act of 1988, Pub.L. 100-702, Title X, § 1019(a), 102 Stat. 4642, 4671 (1988). *See* David D. Siegel, Practice Commentary, 9 U.S.C. § 16, at 501 (West 1999).

In short, § 16 was enacted to clear away the deadwood and "furnish a clear rule for appealability of orders relating to arbitration proceedings," not to erect a set of distinctions as esoteric as the law-equity distinction. *Napleton*, 138 F.3d at 1217 (Wood, J., dissenting); *see also Arnold*, 920 F.2d at 1275 n. 5 ("[O]ne purpose in

passing the amendment was to give clarity to an area of the law that had become confused, obscure and relied on the procedural posture of the case."); *Campbell v. Dominick & Dominick, Inc.*, 872 F.2d 358, 361 (11th Cir.1989) (quoting a statement by Senator Howell Heflin that "under the prior doctrine, '[t]he appealability of orders that direct arbitration, stay arbitration, or stay judicial proceedings depend[ed] on accidents of procedure that d[id] not respond to any rational needs of either appeals timing or arbitration.' 134 Cong. Rec. S16284, S16309 (daily ed. Oct. 14, 1988)."). The intent behind § 16 is equally evident in the provision's legislative history, especially the Senate Judiciary Committee's statement that "under the proposed statute, appealability does not turn solely on the policy favoring arbitration. Appeal can be taken from . . . a final judgment dismissing an action in deference to arbitration. These appeals preserve the general policy that appeals should be available where there is nothing left to be done in the district court." *Arnold*, 920 F.2d at 1274-75 (quoting *Committee on the Judiciary, Section by Section Analysis on S1482*, 100th Cong., 2d Sess., 134 Cong. Rec. S16284, Oct. 14, 1988) (alteration in original omitted).

Our view that the embedded/independent distinction ought not defeat our jurisdiction in this case is also supported by logic and common sense. The Fifth Circuit's assertion that "[a]n order involving an embedded proceeding is *always* an interlocutory order," *Altman Nursing, Inc.*, 84 F.3d at 771 (emphasis added), is wrong. "While orders compelling arbitration in all independent arbitrability proceedings are necessarily final decisions, it does not logically follow that orders in all embedded arbitrability proceedings are necessarily interlocutory." *McCarthy*, 122 F.3d at 1247 (Pregerson, J., dissenting) (emphasis omitted).

That proposition is confirmed by this case. The district court could have stayed Randolph's claim pending arbitration, but it determined that all of the issues raised were arbitrable. Accordingly, it dismissed the case. Moreover, the dismissal was with prejudice. That is a feature that apparently was not present in most of the cases decided by circuits relying on the embedded/independent distinction. The opinions in those cases either involved dismissals without prejudice or did not clearly state the nature of the dismissal. " 'A dismissal with prejudice clearly is a decision that ends the litigation on the merits and leaves nothing for the court to do but execute a judgment.' " *Morewitz*, 62 F.3d at 1361 (quoting *Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 673 (5th Cir. Unit B 1982) (quotations omitted)).[5]

Thus, our reading of § 16(a)(3) compels our conclusion that where the district court effectively disposes of all other issues by issuing an order compelling arbitration and dismissing the remaining claims with prejudice, we have appellate jurisdiction over the case. Whatever usefulness the terms "embedded" and "independent" may have in describing some proceedings involving arbitration claims, we decline to follow the same "myopic and talismanic adherence to the independent/embedded distinction," *Napleton*, 138 F.3d at 1217 (Wood, J., dissenting) (quotations and citation omitted), that some circuits have exhibited. Because the district court's dismissal of Randolph's action with prejudice left it with "nothing . . . to do but execute the judgment," *Morewitz*, 62 F.3d at 1361 (quotation and

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[5] We have no occasion to decide whether an appeal from an order compelling arbitration in an embedded proceeding is a "final decision" when the district court dismisses the action *without* prejudice. We do note that this court has said that "dismissals without prejudice may be appealable [under 28 U.S.C. § 1291], [but] they are only appealable if they are 'final orders.' " *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1094 n. 7 (11th Cir.1996) (citation omitted).

citation omitted), we hold that its order compelling arbitration was an appealable "final decision" under 9 U.S.C. § 16(a)(3).

B. THE ENFORCEABILITY OF THE ARBITRATION CLAUSE

Having determined that we have jurisdiction over this appeal, we now turn to the question whether the TILA precludes the enforcement of the arbitration clause in the retail installment agreement signed by Randolph. Because the arbitration clause signed by Randolph in this case fails to provide the minimum guarantees required to ensure that she can vindicate her statutory rights under the TILA, we conclude that the arbitration clause in this case is unenforceable.

As an initial matter, we recognize that "[a]rbitration ordinarily brings hardships for litigants along with potential efficiency. . . . In light of a strong federal policy favoring arbitration," some "inherent weaknesses" in the procedural apparatus of an arbitration "should not make an arbitration clause unenforceable." *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir.1998). The Supreme Court has stated, " '[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.' " *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, 111 S.Ct. 1647, 1653, 114 L.Ed.2d 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, 105 S.Ct. 3346, 3359, 87 L.Ed.2d 444 (1985).)

Nevertheless, we held in *Paladino* that some procedural flaws present such barriers to a would-be litigant's exercise of his or her statutory rights that they render an

arbitration clause unenforceable. "When an arbitration clause has provisions that defeat the remedial purpose of [a] statute, . . . the arbitration clause is not enforceable." *Paladino*, 134 F.3d at 1062 (citation omitted). As the Tenth Circuit has stated,

> As *Gilmer* emphasized, arbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition[ ] falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights. Accordingly, an arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum.

Shankle v. B-G Maintenance Management of Colorado, Inc., 163 F.3d 1230, 1234 (10th Cir.1999) (citations omitted). While the arbitral forum usually serves as just such an alternative, some barriers of access to that forum may render an arbitration clause unenforceable. *See id.* at 1234 n. 3.

In particular, we held in *Paladino* that forcing a plaintiff to bear the brunt of "hefty" arbitration costs and "steep filing fees" constitutes "a legitimate basis for a conclusion that the [arbitration] clause does not comport with statutory policy." *Paladino*, 134 F.3d at 1062. Thus, we held that an employer's arbitration agreement did not "comport with [the] statutory policy" of Title VII because the plaintiff would have had to pay a filing fee of $2000 to arbitrate her claim of gender discrimination, and might have had to bear at least half the substantial cost of the arbitration. *Id.*

Other courts have raised similar concerns. *See Shankle*, 163 F.3d at 1234-35 & n. 3 (concluding that a "fee-splitting" provision of an arbitration agreement substantially limited an employee's use of the arbitral forum and therefore rendered the arbitration agreement unenforceable); *Cole v. Burns International Sec. Services, Inc.*, 105 F.3d 1465, 1484-85 & n. 12 (D.C. Cir.1997) (requiring an employer to bear the sole costs of an arbitrator's fees where the arbitration was imposed by the employer, and noting but declining to address the question whether an arbitrator's "refusal to waive filing and other administrative fees could preclude enforcement of an arbitration agreement").

The arbitration clause in this case raises serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses that may curtail or bar a plaintiff's access to the arbitral forum, and thus falls within our holding in *Paladino*. This clause says nothing about the payment of filing fees or the apportionment of the costs of arbitration. It neither assigns an initial responsibility for filing fees or arbitrators' costs, nor provides for a waiver in cases of financial hardship. It does not say whether consumers, if they prevail, will nonetheless be saddled with fees and costs in excess of any award. It does not say whether the rules of the American Arbitration Association, which provide at least some guidelines concerning filing fees and arbitration costs, apply to the proceeding, whether some other set of rules applies, or whether the parties must negotiate their own set of rules.

At oral argument, Green Tree asserted that arbitrations arising under this clause typically do not use the AAA rules, but did not specify what set of rules applies. Nor did Green Tree describe the atypical cases in which

the AAA rules do apply. Green Tree also asserted at oral argument that the arbitrator may apportion the fees of the arbitration in his award, but that provides no guarantee that a consumer successfully arbitrating under this clause will not be saddled with a prohibitive costs order, despite the small sum that is likely to be the object of the dispute in arbitrations of this kind. Finally, Green Tree stated to us that no filing fees are required, but the arbitration clause itself says nothing about that, and whether there are filing fees is likely to depend on who conducts the arbitration, something the arbitration clause is silent about.

Accordingly, we conclude that the arbitration clause in this case is unenforceable, because it fails to provide the minimum guarantees required to ensure that Randolph's ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration. *See Paladino*, 134 F.3d at 1062 ("When an arbitration clause has provisions that defeat the remedial purpose of the statute, . . . the arbitration clause is not enforceable." (citation omitted)).

The facts of this case distinguish it from cases in which other circuits have held that an arbitration agreement was enforceable despite substantial arbitration costs. In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 15-16 (1st Cir.1999), the First Circuit rejected an argument that the New York Stock Exchange's arbitration procedures were unenforceable to arbitrate a Title VII claim merely because plaintiffs could be charged high forum fees.[6] But the court in *Rosenberg* had before

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[6] The court did find, however, that the plaintiff should not be compelled to arbitrate her claims, because she was not given adequate notice that her statutory claims would be subject to arbitration. *See Rosenberg*, 170 F.3d at 20-21.

it a record suggesting that most successful arbitral claimants were awarded fees and costs; we lack similar information about how claimants fare under Green Tree's arbitration clause. Because the clause is silent on the subject of arbitration fees and costs, Randolph might be required to bear substantial costs of the arbitration even if she were to prevail on her TILA claim.

Another distinguishable case is *Doctor's Associates, Inc. v. Stuart*, 85 F.3d 975 (2d Cir.1996). There, the defendants argued that an arbitration agreement was unconscionable and unenforceable because of high filing fees and arbitrators' costs. The Second Circuit held that the agreement was not unconscionable. *See Stuart*, 85 F.3d at 980-81; *see also Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir.1998) (relying on *Stuart* to find an arbitration agreement enforceable in a similar case, where the plaintiff's estimated total costs of arbitration were between $28,000 and $32,000). But the arbitration clause in *Stuart* arose in the context of a commercial franchise agreement, *see Stuart*, 85 F.3d at 977-78, not a small consumer transaction (as in this case) or an employment agreement (as in *Paladino*). It was challenged on the general grounds that the clause was unconscionable, whereas Randolph argues that the clause in this case prevents her from vindicating specific statutory rights under the TILA.

We conclude that the arbitration clause at issue here is unenforceable. Because we decide the issue on this ground, we need not decide whether the TILA precludes *all* arbitration agreements.

IV. CONCLUSION

For these reasons, we REVERSE the district court's order and REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
M.D. ALABAMA
NORTHERN DIVISION

No. 96-D-11-N

LARKETTA RANDOLPH, *et al.*,
Plaintiffs,

v.

GREEN TREE FINANCIAL CORP., *et al.*,
Defendants.

Nov. 26, 1997

MEMORANDUM OPINION AND ORDER

DE MENT, District Judge.

On January 25, 1994, Plaintiff Larketta Randolph purchased a mobile home from Better Cents Home Builders, Inc. in Opelika, Alabama. Randolph financed her purchase through Green Tree Financial Corp.—Alabama. Her financing documents required "vendors single interest" insurance, which protects the vendor or lienholder against the costs of repossession in the event of a default. (*See* Pl.'s Am.Compl., Ex. A.) The installment contract also contains an arbitration provision requiring the resolution of disputes "arising from or relating to" the contract.[1] (*See* Pl.'s Am.Compl., Ex. B, ¶ 17.)

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[1] The arbitration provision contained in Plaintiff's installment contract reads in pertinent part:

On January 3, 1996, Randolph filed the instant action. Her Complaint, as amended on December 10, 1996 and September 29, 1997, seeks recovery from Green Tree Financial Corp.—Alabama, Green Tree Financial Corp., and Green Tree Financial Servicing corporation (collectively "Green Tree")[2] under two theories: (1) violation

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> 17. ARBITRATION: All disputes, claims or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration. . . . This arbitration Contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C.A. Section 1. . . . The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort and property disputes will be subject to binding arbitration in accord with this Contract.

(*See* Compl., Ex. B) (emphasis in original).

Paragraph 16 of Plaintiff's contract also states:

> 16. WAIVER OF JURY TRIAL. I hereby waive any right to a trial by jury that I have in any subsequent litigation between me and the seller, or me and any assignee of the Seller, where such litigation arises out of, is related to, or is in connection with any provisions of this Contract whether the Contract is asserted as the basis for a claim, counterclaim, or cross claim, or a defense to a claim, counterclaim, or cross claim.

(*Id.*)

[2] The retail installment contract executed by Randolph identifies Green Tree Corp. as the assignee. Green Tree—Alabama provides contract services for, and is a wholly owned subsidiary of, Green Tree Corp. Defendants contend that Green Tree Financial Servic-

of the Truth In Lending Act ("TILA") for failure to disclose the "vendors single interest" requirement; and (2) violation of the Equal Credit Opportunity Act ("ECOA") for requiring waiver of statutory causes of action.[3] Randolph also brings this action on behalf of a similarly situated class. (Am.Compl. ¶¶ 12-19.)

In lieu of an Answer, Green Tree filed a Motion To Stay Action and Compel Arbitration, as well as several subsequent briefs and memorandums in support thereof. Pursuant to a request from the court, Green Tree filed one consolidated pleading on October 31, 1997 styled "Motion Of [Green Tree] to Compel Arbitration, Motion To Stay, Or, In The Alternative, Motion To Dismiss And

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ing Corporation was not involved with Randolph's transaction, and that its activities in Alabama have not involved consumer finance transactions. Defendants submitted the Affidavit of Brian F. Corey in support of these contentions. Plaintiff has not presented any evidence in rebuttal, nor does the record disclose any evidence of Green Tree Financial Servicing Corporation's involvement in Randolph's transaction, or, consequently, the propriety of it remaining in this action. Accordingly, the court finds that Green Tree Financial Servicing Corporation is due to be dismissed from the above-styled action. *See* Fed.R.Civ.P. 12(b)(6); Fed.R.Civ.P. 41(b).

3 Plaintiff has filed a total of three Complaints: her original on January 3, 1996, a "Second Amended Complaint" on December 10, 1996, and an "Amended Complaint" on September 29, 1997. Her Second Amended Complaint alleges that the "procurement of the arbitration contract is a fraudulent scheme effectuated by the superior bargaining power of defendant to prevent litigation, in that it is placed in an inconspicuous place on the contract, and is therefore void and unenforceable." (Pl.'s Second Am.Compl. ¶ 12.) Her Second Amended Complaint alleges that this "fraudulent scheme" amounts to fraud in the inducement of the arbitration contract. (*Id.* ¶¶ 29-33.) In her subsequent Amended Complaint, however, Plaintiff does not reallege any fraudulent scheme on the part of Green Tree, nor do her subsequent pleadings on dispositive motions address this contention. The sole issue before the court, however, is the enforceability of the arbitration provision in Plaintiff's contract, not the merits of Plaintiff's Complaint.

Brief In Support Thereof." ("Defs.' Consolidated Mot.") These Motions are the subject of this Memorandum Opinion and Order. After careful consideration of the arguments of counsel, relevant law, and the record as a whole, the court finds that the collective Green Tree Motion To Compel Arbitration is due to be granted. Rather than stay this action, however, the court finds that dismissal with prejudice is appropriate. Accordingly, the court finds that the collective Green Tree Motion To Stay Action is due to be denied, but that the Motion To Dismiss is due to be granted. Finally, the court finds that Green Tree Financial Servicing Corp. is due to be dismissed as a party to this action.

JURISDICTION

The court properly exercises subject matter jurisdiction pursuant to 28 U.S.C.A. § 1331 (federal question) and 15 U.S.C.A. § 1640. The parties do not contest personal jurisdiction or venue.

DISCUSSION

Section 2 of the Federal Arbitration Act ("FAA") provides that a written agreement to arbitrate in a contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [4] 9 U.S.C.A. § 2. The effect of § 2 is "to create a body of

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[4] The parties do not contest the question of whether Plaintiffs' contract in this action satisfies the nexus to interstate commerce requirement of the FAA. (*See* Pl.'s Opp. at 6, n.2; Defs.' Consolidated Mot. at 2-3.) Accordingly, the court finds that for the purposes of this Memorandum Opinion and Order, Plaintiff's contract satisfies this jurisdictional prerequisite of the FAA. *See generally, Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); *Staples v. Money Tree, Inc.*, 936 F.Supp. 856 (M.D.Ala. 1996).

federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Section 3 provides for the stay of proceedings in federal district courts when an issue in the proceedings is referable to arbitration. 9 U.S.C.A. § 3. Section 4 provides for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement. 9 U.S.C.A. § 4.

Whether an arbitration provision is enforceable, as opposed to the merits of the underlying dispute, is a question for the court. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985); *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067 (11th Cir.1993). Any doubts about the scope of arbitrable issues should be resolved in favor of arbitration, even if the result is piecemeal litigation. *See Byrd*, 470 U.S. at 218-21; *Moses H. Cone*, 460 U.S. at 24; *Kelly*, 985 F.2d at 1069.

In enacting the FAA, Congress manifested a "liberal federal policy favoring arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25, 111 S.Ct. 1647, 114 L.Ed.2d 26 (quoting *Moses H. Cone*, 460 U.S. at 24). The Act's purpose "was to reverse the long-standing judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Id.* at 24. Therefore, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," *Moses H. Cone*, 460 U.S. at 24, and courts must "rigorously enforce agreements to arbitrate." *Byrd*, 470 U.S. at 221.

Even with this strong federal policy in mind, however, arbitration is a matter of contract, and a party cannot be compelled to arbitrate any claims which he or she has not agreed to submit to arbitration. *AT & T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). Accordingly, "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Section 2 of the FAA allows courts to give relief where the party opposing arbitration presents "well supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.' " *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483-84, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) (quoting *Mitsubishi Motors*, 473 U.S. at 627; 9 U.S.C.A. § 2).

Plaintiff bears the burden of demonstrating why the arbitration agreement in this action should not bind the parties, *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-26, 107 S.Ct. 2332, 96 L.Ed2d 185 (1987), and raises several grounds as to why the court should not compel arbitration. Alternatively, Plaintiff requests that the court certify a class before ordering arbitration.

I. Enforcement Of The Arbitration Provision Is Not Statutorily Barred

A. Background

Plaintiff contends that Green Tree's actions both in requiring "vendors single interest" insurance and in requiring arbitration of her claims violates her rights under

the TILA and ~~the~~ ECOA. Plaintiff's first argument is that requiring "vendors single interest" insurance "imposes an extra charge for insurance each year in the approximate amount of $15.00 and constitutes a clear violation of the [TILA]," because this charge was not disclosed.[5] (Pl's Opp. at 1.) The TILA requires the disclosure of certain credit charges articulated in the Act. *See* 15 U.S.C.A. § 1601, *et seq.*

Additionally, Plaintiff contends that under 15 U.S.C.A. § 1691(a)(3), a provision of the ECOA, "a consumer who wishes to reserve the right to judicial redress for such violations cannot be denied credit." (Pl.'s Opp. at 11.) Plaintiff further cites regulation B implementing the ECOA, which she contends "prohibits presenting terms which violate the Act to a consumer in such a manner as to convey the impression to a reasonable consumer that they are mandatory." (Pl.'s Reply at 3 (citing 12 C.F.R. § 202.4(1), Commentary).) Plaintiff argues that "in order to finance with Green Tree, it is necessary to submit all disputes . . . to arbitration." (Pl.'s Reply at 1.) Accordingly, "[b]y requiring consumers to sign a contract waiving statutory causes of action, Green Tree violates [the ECOA] which prohibits a creditor from requiring a waiver of rights." (Am. Compl. ¶ 27.) Essentially, Plaintiff con-

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[5] Plaintiff contends that: (1) "Green Tree is a creditor within the meaning of TILA;" (2) "The notes and security instruments signed by plaintiff and borrowers for the purchase of mobile homes were extensions of credit subject to TILA;" (3) "The requirement that insurance policies contain provisions covering Green Tree's possible repossession expenses are credit charges as defined by TILA and occur annually when each policy is renewed;" and (4) "No TILA disclosures are given by Green Tree." (*See* Am.Compl. ¶¶ 21-23.) Green Tree does not rebut these contentions and instead only addresses the merits of the arbitration issue. In this Memorandum Opinion and Order, however, the court only addresses the question of whether Plaintiff may be compelled to arbitrate her claims, not the merits of the underlying claims themselves.

tends that "[a] creditor may not condition the extension of consumer credit upon the consumer's waiving his right to judicial redress for violations of [TILA]." (Pl.'s Opp. at 19; *see also* Pl.'s Reply at 1.) In other words, "a creditor cannot insist that the consumer sign a predispute arbitration clause covering claims under [TILA]." (Pl.'s Opp. at 12.).

Hence, Plaintiff contends that because Green Tree fails to disclose the "vendors single interest" requirement in its TILA disclosures, she is entitled to damages, including attorney's fees and litigation expenses pursuant to 15 U.S.C.A. § 1640. (Am.Compl. at 6.) She requests similar damages for the alleged ECOA violations. (Am. Compl. at 7.)

Green Tree argues that "[e]nforcement of arbitration in the context of TILA claims does not run afoul of any of the provisions of the [ECOA]. Plaintiff has available to her the full panoply of rights granted by the ECOA, and the only limitation imposed is that her remedies be pursued in arbitration rather than in the judicial arena." (Defs.' Consolidated Mot. at 3.)

B. Analysis

In determining whether Congress intended to preclude waiver of judicial remedies, the Supreme Court has prescribed a two-step inquiry. First, the court must determine whether the Parties' agreement to arbitrate reaches the statutory issues, and then, upon finding it does, the court must consider whether legal constraints external to the Parties' agreement foreclosed the arbitration of those claims. *Mitsubishi Motors,* 473 U.S. at 629; *see also McMahon,* 482 U.S. at 226-27.

As for the first prong of the *Mitsubishi Motors* test, and resolving all doubts in favor of arbitration, *Byrd,* 470 U.S.

at 218-21; *Moses H. Cone*, 460 U.S. at 24; *Kelly*, 985 F.2d at 1069, the court finds that the arbitration provision at issue here reaches the statutory issues. The arbitration provision provides for binding arbitration of "[a]ll disputes, claims or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clauses or the entire contract." (*See supra*, n. 1.) The provision also provides that "[t]he parties agree and understand that all disputes arising under case law, statutory law, and all other laws, including, but not limited to, all contract, tort and property disputes will be subject to binding arbitration in accord with this Contract." *Id.* The court finds the terms of the provision to be sufficiently broad to encompass Plaintiff's TILA, ECOA, and other claims in this suit, notwithstanding Plaintiffs' protestations that the provision does not specifically reference applicable statutes. (Pl.'s Reply at 4); *see, e.g. Green Tree v. Lipham*, CV-96-D-208-N (M.D.Ala.1997) (De Ment, J.) (broadly construing same provision at issue here); *Ex parte Isbell*, 1997 WL 531100 (Ala., August 29, 1997) (same); *Ex parte Gates*, 675 So.2d 371 (Ala.1996) (same); *see also McCarthy v. Providential Corp.*, 1994 WL 387852 (N.D. Cal. July 19, 1994) (enforcing arbitration provision applicable to "any controversy or claim arising out of or relating to" loan documents even though it did not specifically reference any federal statute); *Lopez v. Plaza Finance Co.*, 1996 WL 210073 (N.D.Ill. April 25, 1996) (similar).

As for the second prong of the *Mitsubishi Motors* analysis, in *McMahon*, the Supreme Court stated that "[t]he Arbitration Act, standing alone, . . . mandates enforcement of agreements to arbitrate statutory claims." 482 U.S. at 226. Indeed, as the *Mitsubishi Motors* court noted:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, the intention will be deductible from text or legislative history.[6]

Mitsubishi Motors, 473 U.S. at 628. The Supreme Court found "no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims." *Id.* at 625.

Even though there is no presumption against the arbitrability of statutory claims, and courts are to "rigorously enforce agreements to arbitrate," *Byrd*, 470 U.S. at 221, the party opposing arbitration may show that "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue," and avoid arbitration. *McMahon*, 482 U.S. at 227. "If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deductible from [the statute's] text or legislative history,' . . . or from an inherent conflict between arbitration and the statute's underlying

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[6] *See also Gilmer*, 500 U.S. at 23 (holding that claims arising under the Age Discrimination In Employment Act may be subject to arbitration); *Rodriguez de Quijas*, 490 U.S. at 480-83 (holding that claims arising under § 12(a)(2) of the Securities Act of 1933, 15 U.S.C.A. § 77*l*(a)(2), may be subject to arbitration); *McMahon*, 482 U.S. at 238-42 (holding that claims arising under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§ 1961-1968, may be subject to arbitration); *Mitsubishi Motors*, 473 U.S. at 629 (holding that claims arising under the Sherman Act, 15 U.S.C.A. §§ 1-7, may be subject to arbitration).

purpose." *Id.* (citing *Mitsubishi Motors,* 473 U.S. at 632-37; *Byrd,* 470 U.S. at 217). Accordingly, Plaintiff must show that Congress intended to preclude a waiver of judicial remedies from either the text of the statute(s), their legislative histories, or from an inherent conflict between arbitration and the statutes' underlying purposes. *Id.* at 227; *see also Gilmer,* 500 U.S. at 26-27. Green Tree argues, and the court agrees, that Plaintiff does not meet her burden.

First, Plaintiff does not cite any provision of the text or legislative history of either the TILA or the ECOA that expressly precludes waiver of judicial remedies. In other words, Plaintiff has not shown that Congress intended for all disputes arising thereunder to be resolved solely by the courts. Instead, Plaintiffs' principal argument is based on her perceived conflict between arbitration and the statutes' underlying purpose: "[u]nder TILA, a consumer has a statutory right to judicial redress, including the right to bring a class action." (Pl.'s Opp. at 11 (citing 15 U.S.C.A. § 1640).) The possibility of class-action exposure, argues Plaintiff, " 'is essential to the prophylactic intent of the Act, and is necessary to elevate truth-in-lending lawsuits from the ineffective nuisance category to the type of suit which has enough sting to insure that management will strive with diligence to achieve compliance.' " (Pl.'s Opp. at 12 (citing *Bantolina v. Aloha Motors,* 419 F.Supp. 1116, 1120 (D.Haw. 1976);) *see also* Pl.'s Reply at 1-2). Plaintiff argues that "[f]ew, if any, borrowers will submit claims to arbitration in this amount [$15-20 per year]. The purpose of the Truth in Lending Act will thus be completely thwarted by allowing an arbitration clause to stand." (Pl.'s Reply at 2-3.)

Further, Plaintiff argues that under 15 U.S.C.A. § 1691, "a consumer who wishes to reserve the right to judicial

redress for such violations cannot be denied credit." (Pl.'s Opp. at 11.) Section 1691 provides in pertinent part:

> (a) It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—
>
> (3) because the applicant has in good faith exercised any right under this chapter.

15 U.S.C.A. § 1691(a)(3). Plaintiff contends that this provision prevents a creditor from requiring a consumer to waive their "statutory right" to judicial redress under the TILA. (Pl.'s Opp. at 11-12.) Because of this "statutory right," Plaintiff contends that "a creditor cannot discriminate with respect to the extension of credit if the consumer insists on preserving the right to seek judicial redress." In essence, Plaintiff's argument is that "a creditor cannot insist that the consumer sign a predispute arbitration clause covering claims under [TILA]." (Pl.'s Opp. at 12.)

As an initial matter, the court notes that contrary to Plaintiffs' assertion, a creditor insisting that a consumer sign a predispute arbitration clause is not similar to a creditor discriminating with respect to the extension of credit if the consumer insists on preserving the right to seek judicial redress. (*See Id.* at 12.) Indeed, Plaintiff apparently recognizes as much when she argues that Green Tree admits that: "[I]f Plaintiff had asked to obtain credit without an arbitration clause so she could pursue rights under TILA and been denied, plaintiff would have an ECOA claim.[7] (Pl.'s Reply at 3.) It is important

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[7] Green Tree contends that contrary to Plaintiff's assertion, it does not "admit" to anything. (Defs.' Consolidated Mot. at 27, n. 9.) Regardless of this dispute, the court merely utilizes Plaintiff's statement to show that Plaintiff recognizes the distinction between a creditor bargaining for an arbitration provision in its

to note that Plaintiff's statutory argument is not that she was denied credit because she refused to sign an arbitration clause. Rather, Plaintiff concedes that she signed the contract with the arbitration provision. Her contention is merely that arbitration should not be required under the TILA and the ECOA.[8]

A creditor can bargain for any provision in a contract, including an arbitration provision, as long as it is legal or does not violate public policy. A consumer who voluntarily enters into a contract with a creditor is bound by the terms and conditions of that contract, assuming no applicable legal or equitable conditions work to render the contract void or voidable. The situation where a consumer enters into a contract containing an arbitration provision, and thus precludes judicial remedies, is much different from the consumer being denied credit because he or she refuses to sign a contract with an arbitration provision. In this action, Green Tree is merely attempting to enforce a predispute arbitration provision. Contrary to Plaintiff's suggestions in her pleadings, she does not argue that she was forced to sign an arbitration provision against her will, or that she was denied credit because she refused to sign a contract with an arbitration provision. She merely contends that requiring arbitration, even though she signed a contract agreeing to arbirate, would violate the underlying purpose of TILA in two ways: (1) by precluding class action litigation as provided for in the statute; and (2) by thwarting the underlying consumer protection purposes of the Act.

Plaintiff relies on the provisions of 15 U.S.C.A. § 1640 for the proposition that because Congress provided for

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contract, and a creditor refusing to extend credit to a consumer because the consumer refuses to accede to an arbitration provision.

[8] Plaintiff also proffers various contractual grounds for not enforcing the arbitration provision which the court addressess *infra*.

class actions under the TILA, Green Tree cannot condition credit on preclusion of class actions or other judicial remedies. Plaintiff also contends that 15 U.S.C.A. § 1691 (a)(3) prohibits the conditioning of the extension of credit on a consumer's waiver of rights provided under the TILA and other consumer protection statutes. However, § 1640 does not create a "statutory right" to pursue class action litigation or other judicial redress, as Plaintiff contends. Section 1640 merely provides for jurisdictional requirements and liability limitations. *See* 15 U.S.C.A. § 1640; *see also Lopez*, 1996 WL 210073 at *3; *Truckenbrodt v. First Alliance Mortgage Co.*, 1996 WL 422150 (N.D.Ill.1996). Providing for class action litigation does not necessarily preclude any other type of dispute resolution or provide Plaintiff with a substantive "right." As the *Gilmer* court noted: "the fact that the [statute] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." 500 U.S. at 32.

The underlying purposes of a statute may, however, preclude waiver of class claims, regardless of contractual provisions entered into between the parties. *See Mitsubishi Motors*, 473 U.S. at 632-37; *Byrd*, 470 U.S. at 217. But, a statute containing provisions governing class action litigation, without more, does not provide a plaintiff with the substantive right to bring her claims as the representative of a similiarly situated class. The Supreme Court addressed this argument in *Gilmer*, where, in the context of the Age Discrimination In Employment Act, it stated that submitting a claim to arbitration does not operate to waive the consumer's rights: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Gilmer*, 500 U.S. at 26; *see also Rodriguez de Quijas*, 490

U.S. at 480; *McMahon*, 482 U.S. at 229-30. Congress did not explicitly preclude arbitration or other nonjudicial resolution of TILA and/or ECOA claims, and Plaintiff has not shown such intention discernible from the text or legislative history.

Additionally, permitting binding arbitration of these statutory claims is consistent with statutory provisions, such as 15 U.S.C.A. § 1640(e), that grant concurrent state and federal jurisdiction for hearing such claims. Where Congress provides for alternate fora, it does not necessarily follow that Congress intended to preclude fora not specifically provided for in the statute. Nor does it follow that Congress intended to limit fora to only those specifically enunciated. Unless otherwise indicated, Congress is merely providing procedural avenues of redress that do not necessarily preclude other avenues; Congress is not providing a substantive right to pursue a class action. As the *Gilmer* court noted: "arbitration agreements, 'like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise.' " 500 U.S. at 29 (quoting *Rodriguez de Quijas*, 490 U.S. at 483). Class actions are procedural devices, while "arbitration is contractual and therefore substantive." *Sanders v. Robinson Humphrey/American Exp. Inc.*, 634 F.Supp. 1048, 1065 (N.D.Ga. 1986), *aff'd in part, Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 n. 5 (11th Cir.1987) (noting the Supreme Court's holding in *McMahon* precluding class treatment of plaintiffs subject to an arbitration agreement). Procedural devices may not supersede substantive rights. *Id.*

The court finds unpersuasive Plaintiff's reliance on case law holding that § 1691(a)(3) bars a creditor from conditioning an extension of credit on the *release* of po-

tential claims for TILA violations arising in the past. (Pl.'s Opp. at 12-14.) In this regard, Plaintiff relies heavily on *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178 (11th Cir.1982). In that case, the sole issue before the Eleventh Circuit was "whether a general release discharging [a creditor] from any claims arising out of the purchase of an automobile constitutes a valid waiver of (Plaintiff's) claims under TILA." *Id.* at 1179. More specifically, the court was solely addressing the question of "whether a person may waive a TILA claim." *Id.* at 1180 (emphasis added). The court held that *under the facts of that case*, the particular release executed by the Plaintiff did not bar a claim under TILA. *Id.* at 1182. Although it discussed the statutory purpose behind TILA, the court specifically held only that the plaintiff's release "[did] not bar her TILA claim because we are convinced that *she was unaware that the release encompassed her TILA* rights." *Id.* (emphasis added). The court did not explicitly base its holding on the underlying purpose of the TILA, but rather on the plaintiff's level of knowledge.

As Green Tree notes, "there is a vast distinction between an instrument which completely absolves a creditor from liability for a previously committed TILA violation (a release) and an instrument which preserves the debtor's rights to pursue future claims against the creditor but prescribes that these claims be resolved by arbitration (an arbitration clause)." (Defs.' Consolidated Mot. at 14.) Preclusion of a claim through a release is fundamentally different from an arbitration provision specifying the particular forum for resolution of a claim. The former prevents a claim from being brought at all; the latter merely provides the forum for its resolution—it does not preclude the consumer from bringing a claim. *See Gilmer*, 500 U.S. at 26; *see also Rodriguez de Quijas*, 490 U.S. at 480; *McMahon*, 482 U.S. at 229-30.

In that context—the preclusion of bringing a TILA claim—the *Parker* court noted that:

> The public benefits from enforcement of TILA because it creates a system of disclosure that improves the bargaining posture of all borrowers. To ensure the realization of this goal, Congress granted consumers a minimum recovery, plus costs and reasonable attorney's fees, without having to prove actual damages. . . . This type of remedy provides a deterrent comparable to exemplary damages because it encourages individuals to bring TILA actions and discourages noncompliance. Strict technical compliance, regardless of actual injury, promotes the standardization of credit terms for the benefit of all borrowers, not just the individual claimant.
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> Not only does TILA contemplate a public interest in the enforcement of individual rights, but the public must rely largely on the efforts of individual consumers acting as "private attorneys general" to achieve the disclosure system envisioned by the Act. . . . If these private attorneys general are permitted to waive TILA claims in circumstances such as those presented in this case, the public interest in deterring inconsistent and undecipherable lending practices would be greatly hampered. The significance of this possibility becomes clearer when we consider that the confusion, and perhaps ignorance, that has led consumers in the past to accept draconian credit terms leaves them equally vulnerable when the lender gives them a general release of prospective claims to sign. The Truth In Lending Act was necessary exactly because borrowers could not force creditors to provide voluntarily a system of credit within which consumers could function intelligently.

Parker, 673 F.2d at 1181 (citations omitted). Significantly, the *Parker* court spoke only of the conflict between a release and the underlying purposes of the TILA. Noticeably absent from the above quoted passage is any discussion of conflict, actual or apparent, between *arbitration* and the TILA's underlying purpose. As noted, a release precludes claims; in contrast, an arbitration provision merely prescribes the forum for hearing those claims. *See also Kelly v. UHC Management, Co., Inc.*, 967 F.Supp. 1240, 1258 (N.D. Ala.1997) (noting distinction between a complete release of liability and an arbitration provision's mere choice of forum).

Plaintiff also relies on *Parker* for the proposition that "TILA is imbued with a public purpose with individuals and their attorneys serving as private attorneys-general. The specific grant of the right to bring class action litigation is part of enforcing that public purpose. . . . [T]he removal of class action relief through arbitration would in essence eliminate compliance with TILA." (Pl.'s Reply at 4.) A close reading of *Parker*, however, shows that the Eleventh Circuit noted that to "ensure realization" of the enforcement of TILA's system of disclosure (compliance), "Congress granted consumers a minimum recovery, plus costs and reasonable attorney's fees, without having to prove actual damages. 15 U.S.C. § 1640(a). This type of remedy provides a deterrent comparable to exemplary damages because it encourages individuals to bring TILA actions and discourage non-compliance. Strict technical compliance, regardless of actual injury, promotes the standardization of credit terms for the benefit of all borrowers, not just the individual claimant." *Parker*, 673 F.2d at 1181.

Thus, although the language of *Parker* could be construed to support the assertion that class action litigation acts to ensure compliance *in addition* to the provisions

for minimum recovery without having to prove actual damages, the Eleventh Circuit has not expressly so held. An equally logical reading of the class action provisions of the TILA, absent *Parker*, could be that because they provide for *limits* on recovery in class actions, Congress was actually concerned with consumers inundating creditors with class actions and securing large recoveries, and thus § 1640 was enacted to actually protect creditors as opposed to ensuring compliance with the Act as Plaintiff contends.

The court emphasizes that it is not indicating that this was the actual intent of Congress. *Parker*, however, is essentially inapplicable to the facts of this action. The Eleventh Circuit addressed a preclusion of claims through a release rather than an arbitration provision's prescription of a forum for hearing those claims. Further, the Eleventh Circuit limited its holding in *Parker* to the facts of the case before it. *Parker*, 673 F.2d at 1182. Consequently, *Parker* falls out of the analysis, and the court is left with Plaintiff's bare assertion, without supporting authority, of what she perceives to be the Congressional intent behind § 1640. While it is true that compliance with TILA, and realization of its deterrent effect, is even more likely if creditors are subject to class actions in addition to Plaintiffs not being required to show actual damages, Plaintiff fails to cite any compelling evidence in support of her position. Absent such evidence, the court finds that Plaintiff has failed to meet her burden of showing why the arbitration provision in her contract should not be enforced.[9]

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[9] Plaintiff also cites *Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994) in support of her position. The court deems it sufficient to note that: (1) the factual situation in *Lai* was far removed from the facts of this case, and are not analogous; (2) *Lai* is not binding precedent in this Circuit; and (3) a multitude of

II. Plaintiff's Contractual Arguments Fail

As noted *supra*, "arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *see also, Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (citing *Byrd*, 470 U.S. at 219); *AT & T Tech.*, 475 U.S. at 648. Plaintiffs contends that there is no consideration for the arbitration clause in her financing documents because the arbitration clause requires the consumer to arbitrate all suits, but gives Green Tree the option of using judicial or non-judicial relief to enforce a security agreement. (Pl.'s Reply at 5; Pl.'s Opp. at 15.) In other words, the arbitration provision "requires the consumer to arbitrate everything but does not require Green Tree to arbitrate anything." (Pl.'s Opp. at 15-16.) Plaintiff also contends that she did not knowingly agree to arbitrate her statutory claims. (Pl.'s Opp. at 20.) Plaintiff argues that "a litigant can only be required to arbitrate a federal statutory claim 'if she has knowingly agreed to submit such disputes to arbitration.'" (*Id.* (quoting *Lai*, 42 F.3d at 1305).) In response, Green Tree admits that a contract generally requires consideration, but argues that the provision at issue in this action was amply supported by consideration. Green Tree also contends that Plaintiff did, in fact, knowingly agree to arbitrate her claims.

Because Plaintiff's contractual arguments are directed exclusively to the arbitration provisions, and not to her

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courts have either limited *Lai's* holding or restricted its application. (*See* Defs.' Consolidated Mot. at 16, n. 4, and accompanying text.)

contract as a whole, the court may properly address these issues. *See Prima Paint Corp. v. Flood Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); *Wheat, First Securities, Inc. v. Green*, 993 F.2d 814 (11th Cir.1993); *Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423, 1441-42 (M.D.Ala.1997). In doing so, the court applies state law governing the formation of contracts, keeping in mind the strong federal policy favoring arbitration. *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *Volt Info.*, 489 U.S. at 468; *American Express Fin. Advisors v. Makareiwicz*, 122 F.3d 936, 940 (11th Cir. 1997); *Roberson v. Money Tree of Ala.*, 954 F.Supp. 1519, 1528 (M.D.Ala.1997).

A. The Arbitration Provision Is Supported By Consideration

Plaintiff contends that the arbitration provision requires the consumer to arbitrate everything, but does not require Green Tree to arbitrate anything. (Pl.'s Opp. at 15-16.) Pursuant to *Hull v. Norcom, Inc.*, 750 F.2d 1547 (11th Cir.1985), Plaintiff argues such "one-way" arbitration clauses are not enforceable. (*Id.*) Plaintiff's consideration argument, essentially, is that the arbitration provision is unenforceable for lack of mutuality of obligation. *See WMX Technologies, Inc. v. Jackson*, 932 F.Supp. 1372, 1374 (M.D. Ala.1996) ("mutuality of obligation is properly viewed as an elaboration of the concept of consideration").

In *Hull*, the Eleventh Circuit, utilizing New York law, addressed an arbitration agreement that required one party to arbitrate but left the other party free to choose between arbitration and judicial enforcement. 750 F.2d at 1549-50. The Eleventh Circuit held that under New York contract law, "the consideration exchanged for one

party's promise to arbitrate must be the other party's promise to arbitrate at least some specified class of claims. Mere presence of an arbitration clause is insufficient to enforce the arbitration provision." *Id.* at 1550. New York law required mutuality; an arbitration provision was unenforceable unless both parties to the contract exchanged reciprocal promises to arbitrate.

Hull's mutuality requirement, based on New York law, has not been widely acepted. Indeed, New York itself has subsequently overruled its mutuality requirement. *See Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 538 N.Y.S.2d 513, 535 N.E.2d 643, 646 (1989) ("mutuality of remedy is not required in arbitration contracts. If there is consideration for the entire agreement that is sufficient; the consideration supports the arbitration option, as it does every other obligation in the agreement"); *see also Latifi v. Sousa*, 1996 WL 735260 at *5 (recognizing same and quoting *Design Benefit Plans, Inc. v. Enright*, 940 F.Supp. 200, 204 (N.D. Ill.1996) ("as far as New York law is concerned, *Hull* is no longer good law")). *Latifi* also notes *Hull's* lackluster reception in a multitude of jurisdictions, including distinguishment on the grounds that *Hull's* mutuality requirement was unique to New York state, or outright rejection of its holding. *See Latifi*, 1996 WL 735260 at *4; *see also Kelly*, 967 F.Supp. at 1259 (declining to follow *Hull* because New York law was inapplicable); *W.L. Jorden & Co. v. Blythe Ind., Inc.*, 702 F.Supp. 282, 284 (N.D. Ga.1988) (same). Because the *Hull* court was following New York law, and Alabama law is applicable in the instant action, Plaintiff's reliance on *Hull* is misplaced.

Contrary to Plaintiff's assertions, Alabama law is not similar to pre-*Sablosky* New York law, the law interpreted in *Hull*; in Alabama, mutuality in arbitration provisions is not required. Under Alabama law, mutuality:

> [D]oes not mean equal rights under the contract, or that each party is entitled to the same rights or covenants under the contact. So long as there is a valuable consideration moving from one side to the other, or there are binding promises on the part of each party to the other, there is adequate consideration for a valid contract.

Marcrum v. Embry, 291 Ala. 400, 282 So.2d 49 (1973). "If there is consideration, there need to be" mutuality of obligation. *Sherrill v. Alabama Appliance Co.*, 240 Ala. 46, 197 So. 1 (1940). Further, in a recent decision, the Alabama Supreme Court acknowledged that no severable or identical consideration is required for an arbitration provision to be enforceable. *Northcom, Ltd. v. James*, 694 So.2d 1329, 1335-36 (Ala.1997). The court merely required ample consideration between the parties in the contract the arbitration provision governs. *Id.*; *see also Goodwin v. Ford Motor Credit Co.*, 970 F.Supp. 1007, 1011 (M.D.Ala.1997).

Alabama contract law does not require mutuality—"equal or reciprocal consideration is not required. . . . So, under Alabama law, even a unilateral arbitration agreement is enforceable, so long as the contract in which it is contained contains some consideration given by each side." *Latifi*, 1996 WL 735260 at *5 (citing *in accord WMX Technologies*, 932 F.Supp. at 1375). Having noted that Plaintiff's contentions are unsupported by *Hull* or by Alabama law, the court finds that the contract between the parties at issue here—and consequently the arbitration provision contained therein—is supported by ample consideration. There are mutually enforceable promises in the contract. Plaintiff's argument accordingly fails.

B. Plaintiff Knowingly Consented To Arbitration

Plaintiff contends that "a litigant can only be required to arbitrate a federal statutory claim if 'she *knowingly* agreed to submit such disputes to arbitration.' " (Pl.'s Opp. at 20 (citing *Lai*, 42 F.3d at 1305) (emphasis added).) She argues that *Parker* supports her contentions because the Eleventh Circuit "held that a release was ineffective to bar plaintiff's TILA claim 'because we are convinced that she was unaware that the release encompassed her TILA rights.' " (*Id.* at 20-22 (citing *Parker*, 673 F.2d at 1182) (emphasis added).) Essentially, Plaintiff is arguing that she has to have "knowledge" of any "right" that she is waiving.

Green Tree contends that "if Plaintiff did not know of the existence of the arbitration provision, it was because she did not take the time to read the installment contract." (Defs.' Consolidated Mot. at 47.) Green Tree points to portions of Plaintiff's deposition which it contends establishes that "any lack of knowledge on her part was not because she could not have read and understood the arbitration clause when she entered into it but, instead, was because of her lack of diligence in taking the time to read the contract when she signed." (*Id.* at 48.)

In arguing that *Parker* precludes enforcement of the arbitration provision, Plaintiff is arguing that enforcement is only appropriate if she "knowingly" agreed to arbitration. In other words, Plaintiff contends that the arbitration provision requires her to waive what she contends to be a substantive right (the right to proceed with a class action), and *Parker* requires the waiver of a substantive right to be made with knowledge. In *Parker*, the Eleventh Circuit held that the plaintiff's *release* did not bar her TILA claims because "she was *unaware* that the release encompassed her TILA rights." *Parker*, 673 F.2d at 1182 (emphasis added).

As noted, *supra*, a release operates as a waiver of substantive rights—the right to pursue claims. In contrast, an arbitration provision does not operate to waive substantive rights (claims), it merely prescribes the forum for enforcing those rights and resolving those claims. Accordingly, *Parker's* holding that on the facts of that case the release did not bar plaintiff's TILA claims because the plaintiff was unaware that the release operated to waive such claims, is inapplicable to the facts of this action. Plaintiff's argument that because *Parker* requires a knowing waiver of rights in a release, the same standard of knowledge should be applied to an arbitration provision is simply incongruous. Again, the court notes the Supreme Court's language in *Gilmer:* [A] party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 500 U.S. at 26 (citing *Mitsubishi Motors*, 473 U.S. at 628). Plaintiff's agreement to arbitrate does not involve a waiver of a substantive right, and the heightened knowledge standard articulated in *Parker* is not applicable to the case at bar. *See also Puentes v. United States Serv., Inc.*, 86 F.3d 196, 198 (11th Cir.1996) (applying knowing and voluntary standard to employee's release of employer from Title VII and 42 U.S.C. § 1981 liability); *Kelly*, 967 F.Supp. at 1257-58.

In her deposition, Plaintiff states that when she received the contract containing the arbitration provision, she "went over the front and glanced over the back." (Randolph Dep. at 51, *See* Green Tree Evidentiary Submission In Supp., Ex 3.) At that time, she did not see anything that caused her any concern. (*Id.*) Plaintiff admits that she could have taken the time to look at the back of the contract if she had wanted to. (*Id.* at 79.) Plaintiff also admits that Green Tree representatives did not say anything to her on a visit to her home that she now contends was

false or untrue. (Pl.'s Dep. at 73.) Nor is there any contention elsewhere in Plaintiff's deposition or pleadings that Green Tree intentionally misled her, made statements that she now contends are false or untrue, or coerced her in anyway into signing her contract.

Plaintiff's deposition testimony establishes that she read the front of her contract, and "glanced" at the back. Green Tree did not pressure Plaintiff or force her to sign the contract without reading it—she admits she could have taken more time if she had wanted to. Nothing concerned her at that time. There is no evidence that Green Tree made any false statements to Plaintiff, or misled her in any way. The evidence merely shows that Plaintiff did not read the back page of her contract—where the arbitration provision was located.

Plaintiff cannot complain now about an agreement to arbitrate she admittedly did not read at the time she signed the contract. *Kelly*, 967 F.Supp. at 1257. Plaintiff's failure to read what she signed does not insulate her from her contractual obligations, including the agreement to arbitrate. *Coleman v. Prudential Bache Sec. Inc.*, 802 F.2d 1350 1352 (11th Cir.1986) (per curiam) ("absent a showing of fraud or mental incompetence, a person who signs a contract cannot avoid her obligations under it by showing that she did not read what she signed"); *Ex parte Stripling*, 694 So.2d 1281, 1283-84 (Ala.1997) (holding that even though plaintiffs did not read the contracts before signing, "ordinarily when a competent adult, having the ability to read and understand an instrument, signs a contract, he will be held to be on notice of all the provisions contained in that contract and will be bound thereby").

This action does not involve a release of liability, as did *Parker*. Instead, it involves an agreement to arbitrate claims arising out of or related to Plaintiff's contract

rather than pursuing those claims in a court of law. Plaintiff had an unfettered opportunity to read her contract. Yet, by Plaintiff's own admission, she merely "glanced over" the back—the page with the arbitration provision. Plaintiff cannot argue that she did not knowingly enter into the arbitration provision based on her admitted failure to read those provisions dealing with arbitration. Under these facts, the court finds that Plaintiff voluntarily and knowingly entered into her contract, including the arbitration provisions contained therein, notwithstanding Plaintiff's contentions that *Parker*'s heightened knowledge requirement applies. The court finds that a release is sufficiently dissimilar in terms of legal effect so as to distinguish the facts and holding of *Parker* from the facts of this case. Accordingly, Plaintiff's argument that she did not knowingly enter into an agreement to arbitrate must fail.

III. The Court Declines To Certify A Class

It is true that compelling arbitration in this instance will eliminate Plaintiff's ability to arbitrate her claims on behalf of a class. Nevertheless, Congress has not created a statutory right—as opposed to a procedural mechanism —to bring class actions under the TILA. Further, the Supreme Court has repeatedly emphasized that courts are to rigorously enforce the parties' agreement as they wrote it; the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone*, 460 U.S. at 21 (emphasis in original); *see also Byrd*, 470 U.S. at 221.

In addition, Plaintiff mistakenly asserts that "the Court's authority to certify a class to proceed in arbitration is questionable." (Pl.'s Opp. at 22.) It is not. In *Protective Life Ins. v. Lincoln Nat. Life Ins.*, 873 F.2d 281 (11th Cir.1989) (per curiam), the Eleventh Circuit addressed

the issue of "whether a district court may consolidate arbitration proceedings if the parties have not provided for consolidation in their arbitration agreements." *Id.* at 282. The Eleventh Circuit concluded "that [a district court] may not." *Id.* The court noted that § 4 of the FAA "limits the power of the court to determining whether a written arbitration agreement exists, and if it does, to enforcing it 'in accordance with its terms.'" *Id.* (citing 9 U.S.C. § 4). The court quoted the Ninth Circuit's observation in *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir.1984), *cert. denied*, 469 U.S. 1061, 105 S.Ct. 544, 83 L.Ed.2d 431 (1984), that:

> this interpretation of section 4 "comports with the statute's underlying premise that arbitration is a creature of contract, and that '[a]n agreement to arbitrate before a special tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.'" *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)). Parties may negotiate for and include provisions for consolidation of arbitration proceedings in their arbitration agreements, but if such provisions are absent, federal courts may not read them in.

Protective Life, 873 F.2d at 282.

The court went on to hold that the agreements between the parties in *Protective Life* "contain their own arbitration clauses, and each clause requires arbitration only between the parties to that agreement. The [parties] never agreed to consolidated arbitration." *Id.*; *see also Kirkpatrick*, 827 F.2d at 725, n. 5. Therefore, because the contracts did not provide for arbitration on a class basis, the Eleventh Circuit declined to read such a pro-

vision into them, and instead, merely enforced the terms of the contract requiring individualized arbitration. The Second, Fifth, Sixth, Seventh, Eight and Ninth Circuits have also held that absent either an express provision in an arbitration clause or statutory authority, courts should not order consolidated arbitration. *See, e.g., Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir.1995); *Government of United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir.1993); *American Centennial Ins. v. National Casualty Co.*, 951 F.2d 107 (6th Cir.1991); *Baesler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir.1990); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir.1987); *Weyerhaeuser Co.*, 743 F.2d at 635; *c.f. Compania Espanola de Petroleos S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir.1975), *cert. denied*, 426 U.S. 936, 96 S.Ct. 2650, 49 L.Ed.2d 387 (1976) (holding that a district court could order consolidated arbitration pursuant to Federal Rules of Civil Procedure 42(a) and 81(a)(3)).

Accordingly, regardless of the wisdom of denying class certification because the agreement between the parties did not provide for class certification for arbitration purposes, *see Champ*, 55 F.3d at 277-78 (Ilana Diamond Rovner, J., concurring), this court is bound by circuit precedent, and thus is required to decline Plaintiff's invitation to certify a class.

IV. Conclusion

Section 3 of the FAA allows a court to stay the proceeding in an action and compel arbitration. 9 U.S.C.A. § 3. However, where all of the issues raised in a complaint must be submitted to arbitration, dismissal of an action is appropriate. *See Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir.1992); *Boyd v. Homes Of Legend, Inc.*, 981 F.Supp. 1423, 1997 WL

619208 *20 (M.D.Ala. 1997); *McCarthy*, 1994 WL 387852 at *9. Accordingly, the court will dismiss Plaintiffs' claims, with prejudice, and compel her to submit them to binding arbitration pursuant to the arbitration provision in her contract.

ORDER

Based on the foregoing, it is CONSIDERED and ORDERED that:

(1) The collective Defendants' Motion To Compel Arbitration be and the same is hereby GRANTED.

(2) The collective Defendants' Motion To Stay Action be and the same is hereby DENIED.

(3) The collective Defendants' Motion To Dismiss be and the same is hereby GRANTED. Such dismissal is WITH PREJUDICE.

(4) Defendant Green Tree Financial Servicing Corporation be and the same is hereby DISMISSED as a party Defendant to this action.

(5) Plaintiff is herewith ENJOINED and RESTRAINED from failing forthwith to arbitrate her claims against the remaining Green Tree Defendants.

APPENDIX C

[Filed Jan. 5, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Case No. 96-D-11-N

LARKETTA RANDOLPH, *et al.*,
Plaintiff,

v.

GREEN TREE FINANCIAL CORP.—ALABAMA, *et al.*,
Defendants.

ORDER

Before the court is Plaintiff's Motion For Reconsideration filed December 10, 1997. Defendants filed a response on December 29, 1997. Plaintiff initially filed suit alleging violations of the Truth In Lending Act ("TILA") and the Equal Credit Opportunity Act ("ECOA"). Plaintiff also brought this action on behalf of a similarly situated class. On November 26, 1997, the court issued a Memorandum Opinion and Order ("Order") granting Defendants' Motion To Compel Arbitration, denying Plaintiff's request to certify a class, dismissing this action, with prejudice, and enjoining Plaintiff from failing to arbitrate her claims against the Defendants.

In its November 26, 1997 Order, the court noted that the only way Plaintiff could avoid arbitration would be through a showing of Congress' intent to preclude arbitration of TILA or ECOA claims. (Order at 9-11.) Such

an intent must be shown either through the text of the Acts, their legislative histories, or from an inherent conflict between arbitration and the Acts' underlying purposes. (Order at 11.) Plaintiff bore the burden of showing why the arbitration agreement at issue in this case should not bind the parties. (Order at 6.)

In her Motion For Reconsideration, Plaintiff asserts that the court ignored "*the only* binding precedent with respect to this particular issue," namely *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530 (M.D. Ala. 1997), *aff'd* 127 F.3d 40 (11th Cir. 1997). (Mot. For Recons. at 1 (emphasis in original).) Plaintiff contends that *Waverlee Homes*, a decision rendered pursuant to the Magnuson-Moss Warranty-Trade Commission Improvement Act, controls the court's disposition of this action. In *Waverlee Homes*, the court analyzed highly detailed and specific provisions of the Magnuson-Moss Act and concluded that Congress intended to preclude binding arbitration of *written* warranty claims arising under the Act. *Id.* at 1537-39; *see also Boyd v. Homes of Legend, Inc.*, 1997 WL 619-208, *12-13 (M.D. Ala. 1997). In *Boyd*, however, the court concluded that *non-written and implied* warranty claims arising under the Magnuson-Moss Act could be subject to arbitration. *Boyd*, 1997 WL 619208 at *18. In other words, the court found that even though Congress intended to preclude arbitration of *written* warranty claims under the Magnuson-Moss Act, it did not intend to preclude arbitration of *non-written or implied* warranty claims. *Boyd*, 1997 WL 619208 at *14, *18.

Significantly, these findings were made even though the Congressional intent of the Magnuson-Moss Act was to "improve the adequacy of information available to consumers, [and] prevent deception," *see Boyd*, 1997 WL 619208 at *11. The court in *Waverlee Homes* rested its findings on *other, specific* provisions of the Act, not solely

on Congress' stated intent in passing the Act. If it had, *Boyd* may have been decided differently. Indeed, in *Boyd*, the court ordered the arbitration of non-written and implied warranty claims arising under the Magnuson-Moss Act, *see Boyd*, 1997 WL 619208 at *14, even though it declined to do so for written warranties in *Waverlee Homes*. *Waverlee Homes*, 954 F. Supp. at 1537-39. Accordingly, not only are *Waverlee Homes* and *Boyd* inapplicable to the court's analysis under the TILA and the ECOA, Plaintiff is simply wrong in asserting that "[i]n both *Boyd* and [*Waverlee Homes*], the Court found that enforcement of the arbitration clause at issue would override the desires of Congress in creating the legislation," (Mot. For Recons. at 2); wrong in asserting that "there is no distinction to be drawn between [Magnuson-Moss and TILA] (*Id.* at 7); and misguided in asserting as support the fact that "all of these consumer protection statutes were passed in a relatively short period of time between 1968-1974." (*Id.*)

The court finds unpersuasive Plaintiff's assertions regarding class certification and finds it unnecessary to revisit that portion of its Order denying Plaintiff's request to certify a class. (Mot. For Recons. at 7-9.) Finally, Plaintiff requests that the court reconsider its Order enjoining Plaintiff from failing to arbitrate her claims against the Defendants. (Mot. For Recons. at 9.) Plaintiff asserts that she does not have the resources to arbitrate and that consequently her "only option . . . is to forego any claims that she may have . . . which is precisely why this defendant requires an arbitration agreement in each and every one of its contracts." (*Id.*) While mindful of the apparent inequitable result of requiring arbitration of TILA and ECOA claims and of not certifying a class, particularly in light of the consumer protection purposes of the Acts, this court finds and does not make law, and is bound by precedent and the mandates of the Eleventh

Circuit Court of Appeals and the United States Supreme Court as it reads them. When and if either the Eleventh Circuit or the Supreme Court hold that Congress intended to preclude arbitration of TILA and/or ECOA claims, or Congress expressly passes such legislation, this court will gladly modify and/or vacate its Order. Until then, it is CONSIDERED and ORDERED that Plaintiff's Motion For Reconsideration be and the same is hereby DENIED.

DONE this the 5th day of January, 1998.

/s/ [Illegible] De Ment
United States District Judge

APPENDIX D

[Filed Oct. 28, 1999]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6055 FF

LARKETTA RANDOLPH, on behalf of herself
and all others similarly situated,
Plaintiff-Appellant,
versus

GREEN TREE FINANCIAL CORP.—ALABAMA; and
GREEN TREE FINANCIAL CORPORATION,
Defendants-Appellees.

On Appeal from the United States District Court
for the
Middle District of Alabama

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING IN BANC

Before: CARNES, Circuit Judge, and FARRIS*, Senior Circuit Judge.

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* Honorable Jerome Farris, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

/s/ [Illegible]
United States Circuit Judge

APPENDIX E

ARBITRATION AGREEMENT CONTAINED IN RETAIL INSTALLMENT CONTRACT

"17. All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire Contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s). This arbitration Contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgement upon the award rendered may be entered in any court having jurisdicton. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this Contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the Contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief. Notwithstanding anything hereunto the contrary, Assignee retains an option to use judicial or non-judicial relief to enforce a security agreement relating to the Manufactured Home secured in a

transaction underlying this arbitration agreement, to enforce the monetary obligation secured by the Manufactured Home or to foreclose on the Manufactured Home. Such judicial relief would take the form of a lawsuit. The institution and maintenance of an action for judicial relief in a court to foreclose upon any collateral, to obtain a monetary judgement, or to enforce the security agreement shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this Contract, including the filing of a counterclaim in a suit brought by Assignee pursuant to this provision."